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IN THE

Supreme Court of the United States

October Term, 1968

No. 792

SAUL I. BIRNBAUM,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on October 4, 1967.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit was issued on October 4, 1968, but is as yet unreported. It is annexed hereto, and appears at pages A-1 –

A-11 of Appendix A.[1] There are also set forth in Appendix A the memorandum orders of the United States District Court for the Southern District of New York dated (1) December 6, 1967, denying petitioner's motion to reduce and suspend sentence pursuant to Rule 35 of the Federal Rules of Criminal Procedure, (2) January 4, 1968, adhering to the decision embodied in the earlier order, and (3) January 27, 1968, denying an order to show cause why a writ of error *coram nobis* or in the nature of *coram nobis* should not be granted.[2]

JURISDICTION

The judgment of the Court of Appeals (App. A, pp. A-1 – A-11) was entered on October 4, 1968. On October 23, 1968, Mr. Justice Harlan granted an extension of time to file this petition to December 3, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

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[1] Citations to Appendix A hereinafter will appear "App. A, p. ."

[2] The orders of December 6, 1967, and January 4, 1968, are also contained in the "Order to Show Cause, Affidavit of Counsel and Affidavit-Petition of Saul I. Birnbaum" at pages 12-13. That document is cited hereinafter as "CNA, p. ." The record also contains a "Memorandum in Support of Motion for a Writ of Error Coram Nobis or in the Nature of Coram Nobis." That document is cited hereinafter as "CNM, p. ." In addition, the record contains a bound collection of "Exhibits Attached to Petition," tabbed Exhibit Nos. 1 through 10, supporting the application for a writ of error *coram nobis* or in the nature of *coram nobis*. Citations to those documents hereinafter will appear "CN Ex. No. , p. ."

QUESTIONS PRESENTED

1. Does a federal trial judge (not acting pursuant to 18 U.S.C. §4208(b)) have authority to impose on a convicted defendant a tentative sentence "for the present," reserving both imposition of final sentence and consideration of factors relevant to the sentence until after the defendant has exhausted his right to appellate review?

2. Where a federal trial judge, because of the defendant's failure to admit guilt and his intention to appeal his conviction, imposes a prison sentence subject to reconsideration and possible reduction to probation after the defendant's appeal, and defers until that time consideration of factors relevant to the sentence; where the judge at the time he imposes the original sentence specifies certain conditions under which he might reduce that sentence to probation, and there is a subsequent unrebutted showing that those conditions have been satisfied; and where the defendant's appeal vigorously attacks the judge's conduct of the trial and the prosecutor contends at the time of reconsideration that the arguments made on appeal militate against reduction of sentence; does the trial judge's unexplained post-appeal refusal to reduce the original sentence require corrective action by this Court in the exercise of its supervisory authority over the administration of criminal justice in the federal courts?

CONSTITUTIONAL PROVISIONS, STATUTE AND RULE INVOLVED

The Fifth, Sixth and Eighth Amendments to the Constitution of the United States; 18 U.S.C. §4208(b), 72 Stat. 845; and Rule 35 of the Federal Rules of Criminal Procedure, are set forth in Appendix B to this petition.

STATEMENT

This case raises fundamental issues concerning the relationship between the sentencing and the appellate processes in the federal courts. the essential issue is whether a federal trial judge may impose a tentative, "for the present," sentence which he says he will reconsider and "might" reduce to probation after the conviction is affirmed on appeal.

The factual situation which presents these issues arose following the conviction of the petitioner in the United States District Court for the Southern District of New York for conspiring to bribe and bribing an agent of the Internal Revenue Service in violation of 18 U.S.C. §§2, 201 and 371.[3] At the sentencing proceeding held April 1, 1966, United States District Court Judge Irving Ben Cooper, who had presided at the trial, imposed what can best be characterized as a "tentative" sentence – a sentence "[f]or the present, then, in the light of your f[r]ame of mind."[4] The frame of mind to which

---

[3] The conviction was subsequently affirmed by the United States Court of Appeals for the Second Circuit in *United States v. Birnbaum*, 373 F.2d 250 (2d Cir.), *rehearing denied*, 375 F.2d 232 (2d Cir. 1966), *cert. denied*, 389 U. S. 837 (1967). A previous conviction under the same indictment had been reversed. *United States v. Birnbaum*, 337 F.2d 490 (2d Cir. 1964).

[4] The pertinent portions of Judge Cooper's remarks at sentencing are contained in CNM, pp. 2-4. In that document, the paragraph starting with the words "For the present, the " is reproduced to read: "For the moment, then". However, the Court of Appeals' opinion quotes the language as set out above in text. App. A, p. A-3. Examination of the original transcript indicates that the Court of Appeals is correct. *United States v. Birnbaum*, No. 61 Cr. 991, United States District Court for the Southern District of New York, Transcript of Proceedings before Hon. Irving Ben Cooper, April 1, 1966, p. 2183. For convenience, Judge Cooper's remarks are also set forth below:

the judge was referring was that petitioner had "not accepted the jury's verdict," *i.e.*, that petitioner would not confess his guilt. Since petitioner continued to "protest

---

4 (Cont'd)

> . . . This is your first criminal conviction. The presentence report and other items brought to this Court's attention do not make you out a callous, insensitive human, one totally devoid of decent behavior.
>
> After all, there are varying degrees of inequity [sic]. I do not regard you as beyond recall. By extraordinary perseverance you weathered the vicissitudes that came with advancing from an economically deprived boyhood to an overwhelming secure economic status as a certified public accountant.
>
> Your grievous error, and here is where I quarrel with the emphasis placed by your attorney, lay in regarding your achievements as the be all and end all of life. By ceaseless hard work, which characterizes a lot of Americans who started from scratch, who had physical limitations – blindness, hunchback, absence of a leg, paraplegics – but it must be said that by ceaseless hard work, you drove a keen brain without letup, but only in one direction, and that was the greedy accumulation of money.
>
> Economic security has been your goal at all cost and no matter what toll it took in denying to yourself most of all the real values of life. . . .
>
> . . . .
>
> . . . There are, and this is fortunate for you, those few who still believe in you, including Mr. Justice Heller [a New York State Supreme Court Justice], and who seem genuinely anxious about your fate.
>
> I feel compelled to make the observation that you have had only a nodding acquaintance with charity and communal affairs. You have had no time for either. You amassed a fortune, a real fortune. Only in America can that happen. Yet, you gave back nothing; nothing, other than a token contribution. You gave nothing back to your school, to your community, to your country.

(Cont'd)

[his] innocence and . . . [was] on the way to appeal," Judge Cooper decided that "now is not the time to explore" concededly relevant affirmative aspects of

---

4 (Cont'd)

> . . . Your sense of values is warped. There has been emphasis on one thing, and that has been a brilliant mathematical mind and what it could produce – false values; empty; devoid of any real sense in going through life.
>
> I know that by far and large that is the open sesame. We all know that, those of us who have really lived and rubbed elbows with all kinds of humanity . . . . I believe you have the instinct to respond to the outcry of the deprived and the unfortunate among us. That feeling resides in latent stage within you, but it might very well be aroused and find expression in overt, tangible action.
>
> However, now is not the time to explore that phase, for you have not accepted the jury's verdict and faced up to its import. You protest your innocence and you are on the way to appeal. Certainly that is your legal right.
>
> For the present, then, in the light of your f[r]ame of mind, let me just add that if your conviction is sustained, this Court might, and I emphasize might, upon an impressively convincing showing that you have realized, or rather realigned, your sights and devoutly wish to give a hunk of yourself as well as your wealth to doing with constancy those acts which will really help your fellow Americans and at the same time enhance you[r] personal well-being immeasurably, I say this Court might consider, and there is where I differ with your lawyer, a program of rehabilitation without confinement as provided for by 18 United States Code, Section 3651.
>
> So for all these reasons, in mitigation of sentence, and especially in light of the additional period of anguish to you since the verdict on the first trial, this

(Cont'd)

petitioner's character.[5] Instead, the judge imposed a tentative sentence of one year, which he committed himself to reconsider "if your conviction is sustained" on appeal.[6] Judge Cooper also said that in reconsidering that tentative sentence he

> might, and I emphasize might, upon an impressively convincing showing that you have realized, or rather realigned, your sights and devoutly wish to give a hunk of yourself as well as your wealth to

---

4 (Cont'd)

> court adjudges you guilty as charged and convicted, and it is adjudged that [you be committed to the custody of] the Attorney General or his authorized representative for imprisonment for a period of one year on each count to run concurrently with each other.

5 It is, in fact, unclear whether Judge Cooper was then actually in possession of the information he needed to explore those aspects of petitioner's character and to impose a sentence for more than "the present." Judge Cooper indicated that a pre-sentence report had been made available to him. CNM, p. 2. Moreover, the minutes of the subsequent argument on the motion to reduce sentence indicate that he intended "to ask the Probation Department to bring this matter up to date." CN Ex. No. 4, p. 44. On the other hand, the Court of Appeals states that what Judge Cooper thereafter received "was the first official probation report prepared by an officer of the probation service of the Southern District of New York". App. A, p. A-5, n. 4.

6 There can be no serious dispute over Judge Cooper's clear commitment to reconsider the sentence after the appeal was concluded. Otherwise, how can one explain his statement that "now is not the time to explore that phase. . . . " See note 4, *supra*. Surely no final sentence could be imposed without that critical phase – the consideration of affirmative aspects of petitioner's character – being fully explored. Thus, by explicitly deciding not to explore it then, Judge Cooper committed himself to explore it after the appeals.

> doing with constancy those acts which will really help your fellow Americans and at the same time enhance you[r] personal well-being immeasurably, I say this Court might consider, and there is where I differ with your lawyer,[7] a program of rehabilitation without confinement as provided for by 18 United States Code, Section 3651.[8]

Thus, what Judge Cooper communicated to petitioner was that he *would reconsider* the one-year sentence after the appeal was completed and that in so doing, he *might impose probation* upon "an impressively convincing showing" that petitioner had, in the interim, given "a hunk of yourself as well as your wealth" to charity. Indeed, the Court of Appeals below found as a fact that petitioner's ". . . attorneys interpreted the court's remarks to mean that if the conviction was sustained Birnbaum could, by following the guidelines in the court's remarks, avoid imprisonment and receive probation."[9]

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[7] Petitioner's trial lawyer had argued that petitioner was already rehabilitated and hence did not need further supervision. See *United States v. Birnbaum*, 61 Cr. 991, United States District Court for the Southern District of New York, Transcript of Proceedings before Hon. Inzer B. Wyatt, January 27, 1968, p. 5.

[8] See note 4, *supra*.

[9] App. A, p. A-4. See also, affidavit of petitioner's trial counsel (CNA, p. 4):

> Judge Cooper's statement at that time was taken by me as meaning that if, during the then forthcoming appeal from the conviction during which the one year prison sentence imposed on Birnbaum by Judge Cooper was to be stayed, Birnbaum should involve himself substantially in philanthropic activities, and if thereafter the conviction were affirmed, Judge Cooper would in all probability suspend the sentence and grant Birnbaum probation.

Since Judge Cooper had expressly referred to New York Supreme Court Justice Heller as a person who "believe[d] in" petitioner, the latter showed the sentencing minutes to Justice Heller and requested his advice. Justice Heller in turn spoke to Judge Cooper and told him that petitioner "was troubled in understanding how to comply with the Court's sentencing remarks." Judge Cooper replied:

> Well, if he doesn't know, why don't you guide him? You have had a great deal of experience in charitable endeavors. So why don't you guide him. If you want to help him, why don't you act as his unofficial probation officer and show him the ropes.[10]

Justice Heller agreed to do so and suggested three specific charitable organizations in which he thought petitioner might become active; Judge Cooper approved them. Thereafter, in his capacity as "unofficial probation officer," Justice Heller visited the leaders of the three organizations, informed them of the situation and arranged for interviews with the petitioner. They approved petitioner's participation in their activities. CNA, pp. 10-11.

It is undisputed that following petitioner's discussion with Justice Heller, his charitable and community activities became extensive. He devoted very substantial amounts of time to the organizations in which he had become interested, both those suggested by Justice Heller

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[10] CNA, pp. 10-11. The substance of the conversations between Justice Heller and Judge Cooper, and between Justice Heller and the petitioner, are set forth in an affidavit executed by the petitioner in support of a motion for a writ of error *coram nobis* or in the nature of *coram nobis* filed in this proceeding. The affidavit states that one of petitioner's attorneys showed the relevant portion of the affidavit to Justice Heller who verified the accuracy of the description of the conversations. *Ibid.*

and three other organizations petitioner himself had sought out. And it is clear that the extensive time and efforts which petitioner did devote to the various organizations was not perfunctory or mechanical. Rather, he called into play imagination, ability, personal sincerity, and a sensitivity to the nature of the problems confronting these organizations; in turn, he brought to bear both ingenuity and devotion in attempting to meet the organizations' needs. CN Ex. Nos. 2, 6.[11] Petitioner also contributed large sums of money to these charitable organizations and pledged substantial additional sums. CN Ex. No. 2.[12]

During this period petitioner met with Justice Heller several times a month so that the latter was familiar with petitioner's activities. Consequently, when the judicial colleagues again met at a later date, Justice Heller reported to Judge Cooper in substance as follows:

> As the unofficial probation officer of Birnbaum I would like to inform you that Birnbaum has become actively and financially identified

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[11] For example, in connection with his work witn the United Cerebral Palsy Association of Nassau County, one of the organizations approved by Judge Cooper in his discussion with Justice Heller, petitioner discovered the need for, and set in motion, a project to plan, construct and operate an institution to care for orphans afflicted with cerebral palsy. CN Ex. No. 6 (2). Petitioner also devoted a great deal of time and energy to St. Augustine's Episcopal School, which offers quality education to Negro children in the Bedford-Stuyvesant area of Brooklyn – including helping to meet its housing crisis, participating in the establishment of a part-time work and part-time schooling program for school dropouts, etc. CN Ex. No. 6(1). These, however, are but examples, and an *amicus curiae* brief which it is understood a number of the charities with which petitioner worked hope to be permitted to file, spells out the nature of petitioner's activities in greater detail.

[12] The Court of Appeals noted that petitioner "is said to have contributed $85,000 to various charitable organizations and pledged an additional $25,000." App. A, p. A-4, n. 2.

> with the three organizations we talked about and [is] putting his heart and soul into all their activities.

CNA, p. 11. Justice Heller also told Judge Cooper that petitioner had independently sought out and had become similarly identified with other charitable organizations. Judge Cooper replied: "That's good, that's fine." *Ibid.*

While petitioner was involving himself in the charitable activities described above, the other phase of the case proceeded. Petitioner appealed to the Second Circuit, as Judge Cooper had recognized he would (". . . you are on the way to appeal."). The appeal was argued by David W. Peck, Esq., former Presiding Justice of the Appellate Division, First Department, New York, who vigorously attacked Judge Cooper's conduct of the trial. The brief contended that the judge "took off in extemporaneous expression, gesturing and raising his voice as he did." [13] It further charged Judge Cooper with having "turned advocate for the prosecution" and characterized his charge to the jury as "egregiously unbalanced", "pious in expression and pernicious in emphasis", "virulently prejudicial", "obviously improper and prejudicial", "calamitous" and "grievously wrong". [14]

That this kind of attack on Judge Cooper's conduct of the trial was well within the proper range of advocacy in the circumstances is evidenced by the opinions of the Court of Appeals, both dissent and majority. Chief Judge Lumbard, in his dissent from the court's affirmance of the conviction, castigated Judge Cooper for his performance at the trial. He concluded that the charge ". . . went so far beyond the permissible limits of comment

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[13] Brief for Appellant at 47, *United States v. Birnbaum*, 373 F.2d 250 (2d Cir. 1966).

[14] *Id.* at 2, 45, 47, 66, 71, 72.

that it denied Birnbaum the fair trial to which every defendant is entitled". *United States v. Birnbaum*, 373 F.2d 250, 265 (2d Cir. 1966). He characterized part of the charge as being ". . . the stuff of which prosecutors make their summations; it ought not be the stuff with which judges charge juries." *Id.* at 267. He went on to say:

> . . . Here the trial judge stepped out of his role and was carried away by his advocacy into remarks which obviously were as extemporaneous as they were unnecessary. In many respects his arguments went beyond those of the prosecution and misstated the claims of the government. There can be no fair trial where the trial judge so abuses his power and puts his great and unquestioned influence in the scales against defendant. . . .
>
> Where the judge's charge contains so many irrelevant and improper arguments which clearly are prejudicial to the defendant we cannot say that the defendant has been fairly tried. In such a case the verdict should be set aside. It matters not how guilty the defendant may be nor how many juries have said so. The proceedings are tainted and should not stand.

Id. at 268-69.

Even the affirming majority in the Court of Appeals, though sustaining the conviction, had little good to say about Judge Cooper's conduct of the trial. It conceded that "we might not have expressed ourselves or ordered our charge as did the trial judge." *Id.* at 265.[15]

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[15] These references to Mr. Peck's arguments and the majority and dissenting opinions are in no way intended as reargument of pre-sentencing issues already finally decided, but rather are included to demonstrate that counsel could not in this case fully represent the legitimate interests of his client without raising serious questions about Judge Cooper's judicial performance.

After petitioner's conviction was affirmed and a subsequent petition for certiorari had been denied, petitioner filed a motion with Judge Cooper "for an order pursuant to Rule 35 of the Federal Rules of Criminal Procedure and 18 U.S.C. § 3651 reducing and suspending the execution of the sentence" imposed on April 1, 1966. CN Ex. No. 1. At that point two relevant intervening events had occurred since the "for the present" sentence had been imposed: (1) Petitioner had complied with Judge Cooper's admonition to "give a hunk of yourself as well as your wealth" to charity; and (2) petitioner's counsel had vigorously attacked Judge Cooper's performance at trial.

As to the first event, petitioner's compliance was established by an extensive showing. See pages 9-11, *supra*. Moreover, Justice Heller, petitioner's "unofficial probation officer," wrote Judge Cooper as follows:

> In carefully reviewing the whole picture, I am convinced that he has undertaken, and is indeed accomplishing, a remarkable job. If permitted to continue with these involvements, he should prove a useful, dedicated and humanitarian servant of our society.
>
> . . . .
>
> In summary, I would say that the defendant's activities, since he was sentenced, clearly indicate a genuine attempt on his part to rehabilitate himself along the lines suggested. You will have before you sufficient "predictive data" to guide you in your difficult decision. I bespeak for the defendant your gifted *intuition*, *insight* and *imagination* in evaluating the redemptive qualities now no longer "latent" but patently observable in the activities of the defendant, and I urge you to consider suspending his sentence.

CNM, pp. 11-12 (emphasis in original). Significantly, the Government's opposition to the motion for suspension of the prison sentence did not contest the evidence disclosing the time, devotion and money petitioner had devoted to charitable activities.[16] Rather, it emphasized the gravity of the crime of which he had been convicted (CN Ex. 3), and on oral argument the prosecutor also made much of petitioner's "refusal, constant, repetitive and insistent dogged refusal to face facts," *i.e.*, his refusal to admit his guilt (CN Ex. No. 4, p. 35). Both arguments, of course, were merely a reiteration of matters urged before Judge Cooper at the time he imposed his "for the present" sentence.

The second intervening event – the vigorous attack that had been made upon Judge Cooper's conduct of the trial by petitioner's counsel on the appeal – obviously was in the minds of counsel when the Rule 35 motion was presented to the judge. Mr. Peck, who had argued the case on appeal, did not appear. Instead, the motion was argued by former United States District Court Judge Simon H. Rifkind, Esq., and the latter evidently made the deliberate judgment that because of the appellate arguments he had much damage to repair. He characterized the trial as fair, spoke fulsomely of Judge Cooper's judicial qualities and apologized to Judge Cooper for Mr. Peck's appellate argument.[17]

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[16] Nor apparently could it have. It appears that until then only one of the numerous individuals with whom petitioner had worked on charitable activities had been spoken to by the probation service, and that individual only briefly by telephone. CNA, p. 15. See also p. 7, n. 5, *supra.*

[17] Mr. Rifkind said (CN Ex. No. 4, pp. 5-6):

> And here, your Honor, what I say I want to say with care. I say to you frankly and with the consent of counsel who preceded me, particularly counsel in the Court of Appeals, that zeal and the partisanship

(Cont'd.)

On the other hand, the prosecutor contended that the argument made by petitioner's counsel on appeal was itself evidence of *petitioner's* bad character. In a letter to Judge Cooper in opposition to the motion for reargument he stated:

> As we have noted consistently throughout this long proceeding, the punishment imposed by this Court upon this defendant was more than just: – it was compassionate. *Nothing more severely impeaches Birnbaum's present protestations of rehabilitation and good character than his continued refusal to recognize and appreciate the degree of human understanding so clearly evidenced by this Court's administration of the trial of Birnbaum's indictment,* by this Court's conscientious determination of a just and compassionate sentence, and by this

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(Cont'd.)

> which is characteristic of devotion to a client both, I think, combined to cloud counsel's judgment to some extent and in my opinion produced some utterances with respect to the conduct of the trial which, in my opinion again, were not justified by the record.
>
> I have told counsel that that was my judgment and he knows that I shall say it to you, and my saying it to you has his complete accord and approval, and he joins in it.
>
> I feel particularly confident in saying that since the Court of Appeals agreed with that. And, of course, that court does not lean on approbation, but it is so. And I suppose the Supreme Court's rejection of a petition for certiorari most likely proceeded on a similar appraisal of this trial.
>
> In short, this defendant has had a fair trial. He has had a trial at the hands of an American jury which was fairly selected. And he has had a trial under the direction of certainly an exceedingly experienced, learned and, more important than that, compassionate Judge.

> Court's painstaking consideration of Birnbaum's prior application for suspension of sentence and for probation.

CN Ex. No. 10, p. 2 (emphasis added).[18]

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[18] Varieties of this argument were made by the government at every stage of this case. In the subsequent argument before Judge Wyatt on *coram nobis*, the prosecutor made the following statement:

> I found that appeal to be the most naked, exaggerated and I use the word advisedly, vicious attack upon a judge's integrity in my short experience at the bar.
>
> It was stated in the brief on that appeal that Judge Cooper's charge to the jury was "pious in expression and pernicious in emphasis," and pernicious, as I read the dictionary, means intending to do evil and wicked.
>
> The Court of Appeals disagreed and the Supreme Court apparently disagreed. I certainly disagreed, your Honor, because I saw the charge and I saw the administration of the trial, and I speak really as a lawyer and not as an advocate, I saw it as an effort by Judge Cooper to bend over backwards to protect this defendant's rights.

United States v. Birnbaum, 61 Cr. 991, United States District Court for the Southern District of New York, Transcript of Proceedings before Hon. Inzer B. Wyatt, January 27, 1968, pp. 42-43. And in its brief on appeal, the government argued:

> It is virtually impossible to read Birnbaum's new argument as anything but an unwarranted, unsupported, and malicious attack upon a District Court Judge who has devoted his life to responsible and respected public service, while Birnbaum was amassing a personal fortune and participating in the corruption of an Internal Revenue Agent . . . . This claim of unfairness . . . appears motivated only by Birnbaum's desperate fear of a deserved punishment. That Birnbaum, for such a reason, would engage in such a vicious tactic in itself is substantial evidence that Birnbaum has not been rehabilitated.

Brief for Appellee at 8-9, *United States v. Birnbaum*, Docket Nos. 32063, 32064 (2d Cir., decided October 4, 1967).

Judge Cooper asked no questions at the argument on the motion to reduce sentence, and shortly after it was held filed a two-sentence memorandum which, although noting that he had "given long and careful consideration" to all the circumstances and arguments, merely stated without explanation: "After due deliberation, this court is satisfied the sentence imposed on April 1, 1966 should not be disturbed." App. A, p. A-12. The judge similarly disposed of the subsequent motion for reargument, which he granted and decided on the papers without hearing oral argument. App. A, pp. A-12–A-13.

Thereafter a motion was made before District Court Judge Inzer B. Wyatt for a writ of error *coram nobis* or in the nature of *coram nobis* for, *inter alia,* a hearing, including the taking of Judge Cooper's testimony, as to why petitioner's prison sentence should not be suspended and probation granted. CNA, pp. 1-2. The motion was denied. App. A, p. A-13. The denials of these motions were consolidated on appeal, and the United States Court of Appeals for the Second Circuit affirmed those denials on October 4, 1968, some eight months after it had heard argument.

REASONS FOR GRANTING THE WRIT

I.

THE SENTENCE IMPOSED ON PETITIONER BY THE TRIAL JUDGE WAS UNLAWFUL BECAUSE IT WAS TENTATIVE RATHER THAN "FINAL IN EVERY RESPECT" AS REQUIRED BY FEDERAL LAW

A. Federal law requires the trial judge to impose a sentence "final in every respect" at the time of the original sentencing

Federal law does not authorize a trial judge to impose a tentative sentence "for the present," as Judge Cooper did here. It is now well established that a federal trial

judge must impose a sentence which is "final in every respect," *United States v. Behrens*, 375 U.S. 162, 165 (1963). There is but one exception to this mandatory requirement: the judge may elect to proceed under 18 U.S.C. § 4208(b), which explicitly authorizes the imposition of a "tentative" sentence that "postpones action as to the final sentence." *Id.* at 165. Unless the trial judge invokes that special procedure with its attendant safeguards[19] – as Judge Cooper did not do here – the sentence he imposes after trial must be intended to be "final in every respect." *Ibid.* He may not, as Judge Cooper did, reserve judgment until a later time on concededly relevant factors in sentencing because he thinks that "now is not the time to explore" them. He must explore these factors at the time of the original sentencing and decide on a "final sentence" at that time. *Cf. Corey v. United States*, 375 U.S. 169, 176 (1963).

Nor does Rule 35 of the Federal Rules of Criminal Procedure weaken the requirement that the original sentence imposed by the judge must be intended to be a final one. Rule 35 provides, *inter alia*, that the trial judge may reduce a lawful sentence within specified periods of time. But that rule "cannot be used to impose a temporary sentence with the intent to take further action after additional information is received."[20] Indeed, this Court has explicitly said that "Rule 35 refers to the power of a court to reduce *a sentence which has already become final in every respect.*" *United States v. Behrens*,

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[19] For a discussion of these safeguards, see pp. 19-24, *infra*. In making the above argument, petitioner is not relying on any claim that Judge Cooper should have employed §4208(b) in this case. However, for an analysis of the availability to the judge of that provision, as well as other alternatives, see pp. 29-30, *infra*.

[20] Barkin, *Impact of Recent Legislation and Rule Changes Upon Sentencing*, 41 F.R.D. 494, 495 (1966).

supra, at 165 (emphasis added). The true office of Rule 35 proceedings – as contrasted with §4208(b) proceedings – is to permit the court to correct a lawful sentence imposed "on the basis of a misapprehension as to the history, character or physical or mental condition of the defendant."[21] Thus, a Rule 35 motion to reduce sentence is properly denied if "no facts [are] presented either by affidavit or on oral argument which were not before the Court at the time sentence was imposed." *United States v. Stromberg*, 179 F. Supp. 278, 280 (S.D.N.Y.), *aff'd*, 268 F.2d 256 (2d Cir.), *cert. denied*, 361 U.S. 863 (1959).[22] It seems clear, therefore, that unless a trial judge specifically invokes §4208(b), he may not properly impose a sentence "for the present," subject to reconsideration "if your conviction is sustained." He may not, as Judge Cooper did, engage in the improper practice of "dangling the possibility"[23] that he may subsequently reduce the tentative sentence to probation.

There are critical considerations of policy underlying the distinction between the authorization to impose a "tenative" sentence under §4208(b), and the requirement that all other sentences be deemed "final in every respect" at the time of their imposition. Proceedings under §4208(b)

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[21] Model Penal Code §7.08, Comment (Tent. Draft No. 2, 1954). The only cases in which it is accepted that Rule 35 might be used to modify a sentence which originally was tentative or conditional in nature have been instances of criminal contempt sentences, where the sentence is both coercive and punitive. *E.g., Brown v. United States*, 359 U. S. 41, 52, n. 15 (1959); *United States v. Levine*, 288 F.2d 272 (2d Cir. 1961).

[22] The Advisory Committee of the American Bar Association's Project on Minimum Standards for Criminal Justice has also suggested " . . . that it is inappropriate for the sentencing court to make a change in the imposed sentence unless new factors have been made known." American Bar Association, *Sentencing Alternatives and Procedures* 279 (Tent. Draft, 1967).

[23] App. A, p. A-10.

are circumscribed by important safeguards, two of which were considered in companion cases decided by this Court in 1963. In *Behrens v. United States, supra,* this Court held that a defendant must be afforded the right, "ancient in the law . . . to make a statement in his own behalf" before the judge decides whether to affirm or reduce the tentative sentence previously imposed, because "[i]t is only then that the judge's final words are spoken and the defendant's punishment is fixed." *Id.* at 165. This right of allocution does not apply, however, in proceedings under Rule 35. Thus, by imposing a tentative "for the present" sentence in the way the trial judge did here, he can obtain the advantages of a §4208(b) tentative sentence without affording the defendant the safeguards required under that section. That this clearly undercuts the policy underlying the *Behrens* decision has been recognized by the Legal Counsel of the Bureau of Prisons:

> It seems obvious that this [amendment to Rule 35] cannot be used to impose a temporary sentence with the intent to take further action after additional information is received without bringing the defendant back to court. This would be a clear contravention of the defendant's right to be present at the time final sentence is imposed and would fly in the face of the Supreme Court ruling in *United States v. Behrens,* 375 U.S. 162, 84 S.Ct. 295, 11 L. Ed. 2d 224, which held that a tentative sentence does not obviate the necessity of having the defendant present when the final sentence is imposed.[24]

Yet this "clear contravention" is precisely what occurred here. Judge Cooper did in this case "impose a

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[24] Barkin, *Impact of Recent Legislation and Rule Changes Upon Sentencing, supra* note 20.

temporary sentence with the intent to take further action." And he did "fly in the face of the Supreme Court ruling in *United States v. Behrens*" by not affording petitioner "an opportunity to make a statement to the judge in his own behalf" at the time when it is "of most importance" – when the "judge's final words are spoken and the defendant's punishment is fixed." *United States v. Behrens, supra,* at 165. The record in this case clearly establishes that petitioner was not offered this right of allocution when "the sentence that counts" was pronounced. *Id.* at 166.[25]

There is another – and perhaps even more important – safeguard that attaches to proceedings under §4208(b) but that is absent when the judge imposes the kind of tentative sentence at issue here. That safeguard was the subject of this Court's decision in *Corey v. United States,* 375 U.S. 169 (1963). The Court held there that when a judge imposes a tentative sentence under §4208(b), the defendant has the "option" of taking his appeal "after either the first or the second sentence." *Id.* at 173. The reason given by the Court for why the defendant must be given the option of appealing "after final termination of the trial court proceedings" – *i.e.,* after the final rather than the tentative sentence has been imposed – is critically relevant to the issues raised by this case. The Court attributed conclusive significance to the fact that "a defendant might think, rightly or wrongly, that the trial court's knowledge that an appeal had already been taken might adversely influence the court's discretion in imposing final sentence." *Id.* at 175.[26] Thus, the decision in

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[25] There is, of course, no requirement that a defendant ask to speak in his own behalf. The trial judge must affirmatively offer him the opportunity to do so. *Gadsden v. United States,* 223 F.2d 627, 632-33 (D.C. Cir.), *cert. denied,* 350 U. S. 949 (1955).

[26] Mr. Justice Harlan, in his dissenting opinion in *Corey,* did not, in any way, suggest approval of the trial judge's being adversely influenced by an appeal. Indeed, he referred to this as "maladministration of criminal justice." 375 U. S. at 179.

Corey was designed, in substantial part, to prevent the possibility that a defendant might be deterred from exercising his right to appeal by the fear, whether well or poorly grounded, that his decision to appeal might incline the judge against reducing the original tentative sentence.

Yet this danger – now eliminated for proceedings under §4208(b) – continues to exist so long as judges may employ tentative sentences of the kind imposed by Judge Cooper in this case. Petitioner here had no option to delay his appeal until after Judge Cooper had spoken his "final words." He had to "show his hand" while the sentence was still tentative and subject to reconsideration; and this enabled the trial judge to consider not only the fact that an appeal had been taken *but the nature of the appeal as well,* before he imposed his final, fixed sentence. This practice of tentative "for the present" sentencing dramatically undercuts the critical policy relied on by this Court in *Corey*:

> Long-accepted and conventional principles of appellate procedure require recognition of the defendant's right to await the imposition of final sentence before seeking review of the conviction. That is the general rule. . . . We find nothing to indicate that Congress intended to depart from that rule in enacting §4208(b).

Id. at 176. Neither is there any indication that Congress intended to depart from this long accepted and conventional principle by allowing trial judges to impose the kind of tentative sentence at issue here, a practice which has the effect of forcing criminal defendants into deciding whether (and how) to appeal before final sentence has been imposed.

Indeed, the policy underlying this Court's decision in *Corey* – that nothing should be done to deter the defendant from exercising his full appellate rights – has been considerably strengthened by recent judicial opinions

condemning the imposition of any pressure, whether overt or subtle, on the defendant to forego exercise of his appellate rights. In the leading case of *Patton v. North Carolina,* 381 F.2d 636 (4th Cir. 1967), *cert. denied,* 390 U.S. 905 (1968), a trial judge's increase of sentence on retrial, following a successful appeal from a prior conviction, was held unconstitutional. Judge Sobeloff, writing for the court, emphasized that "the risk of a greater sentence . . . may prevent defendants who have been unconstitutionally convicted from attempting to seek redress." *Id.* at 639. The possibility of a harsher sentence after appeal "frustrates the pursuit of post-conviction remedies provided by the State. Courts should be especially vigilant to protect access to these remedies, rather than strive to fashion a doctrine inhibiting the exercise of the right to review." *Id.* at 643.

The First Circuit recently arrived at a similar conclusion. In remanding for resentencing a case in which a trial judge had imposed a harsher sentence on retrial, Chief Judge Aldrich said that a defendant "should not have to fear even the possibility that his exercise of his right to appeal will result in the imposition of a direct penalty for so doing." *Marano v. United States,* 374 F.2d 583, 585 (1st Cir. 1967). The court held that "there must be repose" as to the sentence or else there "might well be substantial deterrents to a decision to appeal." *Ibid.*

The *Patton* and *Marano* cases thus hold that a trial judge must be denied the power to increase the sentence of a *successful* appellant, so as not to deter the right to appeal. It is equally important to deny the trial judge the power to manipulate the sentence of an *unsuccessful* appellant. Since no defendant knows, at the time he decides whether and how to appeal, if he will be successful or unsuccessful, the practice employed by Judge Cooper can be just as effective – and hence as illegal – a

deterrent to a defendant's right to take a vigorous appeal as the practice condemned in *Patton* and *Marano*.[27]

The issue raised by the *Patton* and *Marano* cases – the power to use the sentence to deter the successful appellant – is now before this Court in *Pearce v. North Carolina*, 397 F.2d 253 (4th Cir.), *cert. granted*, 21 L.Ed. 2d 114 (1968) (No. 413). Petitioner herein submits that this case represents the opposite side of the *Pearce* coin: whether the trial judge should be denied the power to use the sentence to deter the unsuccessful appellant.

B. The original sentence imposed on petitioner in this case was tentative rather than final, and the decision below sustaining that sentence is in conflict both with this Court's decision in Corey v. United States, and with decisions of the First, Fourth and Fifth Circuits.

There can be little doubt that the original sentence imposed on petitioner by Judge Cooper was not intended to be "final in every respect." *United States v. Behrens, supra.* It was explicitly stated to be only "for the present," since the trial judge did not regard that as the appropriate time to consider admittedly relevant affirmative aspects of petitioner's character ("now is not the time to explore that phase"). Indeed, the Court of Appeals below seemed to concede that the sentence was not intended to be "final in every respect." It found as a fact that "Judge Cooper unambiguously reserved the power to reassess the situation and decide whether, after Birnbaum's conviction became final, probation would be inappropriate in light of all relevant factors, including that of appellant's

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[27] This Court has recognized – in a different but related context – the impropriety of distinguishing between successful and unsuccessful criminal litigants. *See Commissioner v. Tellier*, 383 U.S. 687 (1966).

behavior while his appeal was pending." App. A, p. A-9. It would be difficult to imagine a more direct violation of the spirit – indeed the letter – of this Court's decision in *Corey v. United States, supra,* which recognized the "defendant's right to await the imposition of final sentence before seeking review of the conviction" in order to avoid any possibility that "the trial court's knowledge that an appeal had already been taken might adversely influence the court's discretion in imposing final sentence." 375 U.S. at 175. In this case, Judge Cooper, by requiring petitioner to appeal from a tentative rather than a final sentence, arrogated to himself powers specifically denied to federal judges by this Court's decision in *Corey*: the power to postpone final imposition of sentence until after the defendant has completed his appeal; the power to pass judgment on the nature of the defendant's appeal; and the power to have the defendant's course of action in the appellate process "adversely influence the court's discretion in imposing final sentence." *Id.* at 175.

The policy considerations underlying the *Corey, Patton, Pearce* and *Marano* line of cases are particularly compelling in a case like this. Judge Cooper was fully aware that the critical appealable issue involved his own judicial performance at the trial.[28] He knew that if defendant appealed the conviction it would be on grounds that might reflect adversely upon his handling of the trial.

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[28] Much of the sentencing proceeding itself was taken up with discussion about the judge's instructions. Indeed, the Judge himself made the following comment:

> There has been an understandable amount of emphasis placed on the Court's charge, and I am not here to uphold it in any way except to say that if I were to recharge the jury today, I would use every one of those words that I actually used.

United States v. Bimbaum, 61 Cr. 991, United States District Court for the Southern District of New York, Transcript of Proceedings before Hon. Irving Ben Cooper, April 1, 1966, p. 2157.

It is particularly dangerous – and unseemly – for a trial judge to "dangl[e] the possibility" of reducing the sentence after appeal in a case where the appeal is certain to involve that very trial judge's performance at the trial.

Not only did the sentence imposed by Judge Cooper in this case undercut important decisions of this Court and of the First and Fourth Circuits, it is also in direct conflict with a recent decision of the Fifth Circuit. In this case, Judge Cooper refused to consider affirmative aspects of petitioner's character at the time of the original sentencing *because* petitioner continued to claim his innocence after the jury verdict ("for you have not accepted the jury's verdict"; "You protest your innocence and you are on the way to appeal"). This approach to sentencing was specifically disapproved in *Thomas v. United States,* 368 F.2d 941 (5th Cir. 1966). In that case,

> . . . prior to imposing sentence the judge advised the defendant that the judge had no doubt whatsoever as to his guilt, and that if he then confessed his guilt the court would take that into account in the length of sentence to be imposed; while, on the other hand, if he persisted in his denial that he participated in the crime, the court would also take that into account. The defendant chose to persist in his claim of innocence, and the court sentenced him to imprisonment for the maximum term permitted by law.

Id. at 942. The Fifth Circuit, in an unanimous opinion by Judge Rives, vacated the sentence, holding that it was improper for a federal court to exact from a defendant "a judicially imposed penalty for exercising his constitutionally guaranteed rights" to assert his innocence and to appeal. *Id.* at 946.

In this case, as in *Thomas,* the trial court imposed a judicial penalty on defendant for continuing to assert his

innocence. In *Thomas*, the penalty was a harsher sentence; in this case, it was the sentencing judge's refusal to consider the affirmative aspects of petitioner's character and his refusal to impose a final sentence before the appeal.[29] The Court's reasoning in arriving at its conclusion that a judge may not penalize a defendant for refusing to concede guilt is most persuasive and relevant to the issues raised by petitioner here:

> It must be remembered that, at the time of his allocution, Thomas had not been finally and irrevocably adjudged guilty. Still open to him were the processes of motion for new trial (including the opportunity to discover new evidence), appeal, petition for certiorari, and collateral attack. Indeed, appeal is now an integral part of the trial system for finally adjudicating the guilt or innocence of a defendant.

Id. at 945. Petitioner here was in precisely the same situation as *Thomas*. He too had "not been finally and

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[29] In the *Thomas* case, the court found that the defendant had been prejudiced even though the judge's statement did not induce him to abandon his right to appeal and to assert his innocence. The court's statement of that point is most relevant to the issues raised in this case:

> Since Thomas chose the second "if," he did not in fact abandon his Fifth Amendment rights, and he retained unimpaired his post conviction remedies. It may then be argued that he came through his dilemma unscathed. True, he received the maximum sentence, but perhaps the district court already had that in mind, and was simply giving Thomas a last minute chance to repent and thereby to secure a reduction of that sentence.

368 F.2d at 945. The court rejected that reasoning and held that defendant had been prejudiced. Similarly here, even though petitioner did not forego his right to appeal, he was prejudiced in that the judge refused to consider affirmative aspects of his character because of his refusal to accept the jury's verdict.

irrevocably adjudged guilty" at the time Judge Cooper charged him with not having "accepted the jury's verdict." Had he accepted the jury's verdict, he too would have foregone the rights enumerated in the Fifth Circuit's opinion. And no judge should be able to impose a judicial penalty on a defendant for his refusal to forego such important rights.[30] The penalty imposed here – the sentencing judge's refusal to consider relevant affirmative aspects of petitioner's character and his unwillingness to impose a final sentence before appeal – was just as real to petitioner as the increased punishment imposed upon Thomas. Indeed, had Judge Cooper considered, and given appropriate weight to these affirmative factors at the time he imposed the original sentence, it must be assumed that the sentence would have been less than the one actually imposed (since a sentence is supposed to reflect the affirmative as well as the negative aspects of defendant's case). And if this is so, as petitioner submits it is, then his penalty was precisely the same as that imposed on Thomas: a harsher criminal sentence.

It is petitioner's contention, therefore, that this case is an appropriate one for the exercise of this Court's discretionary certiorari jurisdiction. The decisions below cannot be reconciled – in holding, in language, or in spirit – with the decisions of this Court in the *Corey* and *Behrens* cases, or with the decisions of the First, Fourth and Fifth Circuits in the *Marano, Patton, Pearce* and *Thomas* cases. Accordingly, petitioner asks this Court to grant certiorari and hold that Federal law does not authorize a federal trial judge to impose the kind of sentence employed by Judge Cooper in this case. This Court should require federal trial judges – for important reasons of law and policy – to impose sentences that are "final in every

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30 Nor should the government be permitted to urge, as it did repeatedly in this case (see pp. 15-16, *supra*), that petitioner should be punished because he refused to concede his guilt after trial but before appeal.

respect," before and not after defendant has taken his appeal.

If this Court so rules, there would still be a number of legitimate ways for a sentencing judge to accomplish whatever beneficent purposes Judge Cooper had in mind in this case. He could, for example, delay the imposition of the sentence until the information he thought necessary became available. Such delay does not carry with it the dangers condemned in the *Corey* case and present in the practice under challenge here; when sentencing is simply delayed, the defendant does not have to "show his hand" concerning the appeal until *after* the judge has imposed final sentence.[31] Alternatively, a sentencing judge might invoke 18 U.S.C. §4208(b) with its considerable safeguards for the defendant.[32] And if the judge wanted

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[31] Delay in imposing sentence is appropriate so long as it is not "unreasonable" and so long as it is "for a proper purpose in the ordinary process of handling the case." *Lott v. United States*, 309 F.2d 115 (5th Cir. 1962), *cert. denied*, 371 U. S. 950 (1963). "Obviously, the most legitimate circumstance [justifying delay] is the conduct of a presentence investigation to aid the court in reaching a just disposition." 8 J. Moore, *Federal Practice* ¶ 32.02[2], at 32-8 (2d ed. 1968).

[32] There is nothing in the language or legislative history of §4208(b) which requires that the defendant be *confined* while information about him is being gathered. *Cf.* Bennett, *Evaluation of the Offender by the Bureau of Prisons*, 26 F.R.D. 331 (1959). The statute says nothing about confinement; it simply allows the defendant to be committed to the "custody of the Attorney General." Such custody may surely include the supervision of the probation service, or other similar agencies that do not require total confinement. In this day of increased reliance on outpatient and community diagnostic services, it would be a step backward for the courts to construe §4208(b) to require confinement even in cases where non-institutional evaluation would do just as well or better.

the defendant to become involved in charitable work, he could impose probation pursuant to Rule 32 of the Federal Rules of Criminal Procedure. Had Judge Cooper imposed probation in this case, he would have been required to define the conditions with some precision.[33] Petitioner would have had the right to appeal conditions such as giving substantial sums to charity, and his challenge would have found substantial precedential support.[34] Most significantly, a prison sentence could not be imposed without a hearing at which a specific and intentional violation of a valid condition would have to be established and the defendant "apprised of the grounds on which such action is proposed." Rule 32(f), Federal Rules of Criminal Procedure.[35]

Each of these alternatives afford the defendant substantial safeguards designed to protect him against the dangers inherent in tentative, "for the present" sentences. But Judge Cooper chose an impermissible alternative that denied to petitioner the safeguards specifically required by Congress and the Courts. That kind of judicial circumvention should not be tolerated by this Court.

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[33] *Butler v. District of Columbia*, 346 F.2d 798 (D.C. Cir. 1965).

[34] See cases cited in Note, 59 Colum. L. Rev. 331, 337 (1959). *See, e.g., United States v. Rosner*, 161 F. Supp. 234 (S.D.N.Y. 1958); *Springer v. United States*, 148 F.2d 411 (9th Cir. 1945); *Karrell v. United States*, 181 F.2d 981 (9th Cir.), *cert. denied*, 340 U. S. 891 (1950).

[35] *Compare, e.g., Hollandsworth v. United States*, 34 F.2d 423, 428 (4th Cir. 1929).

II

THE CIRCUMSTANCES OF THIS CASE CAST SUCH DOUBT UPON THE INTEGRITY OF THE APPELLATE PROCESS THAT THEY CALL FOR CORRECTIVE ACTION PURSUANT TO THE SUPERVISORY AUTHORITY OF THIS COURT OVER THE ADMINISTRATION OF CRIMINAL LAW IN THE FEDERAL COURTS

Improper motivation of a sentencing judge is "characteristically a force of such low visibility" that it is "an impossible task for a prisoner to prove." *Patton v. North Carolina, supra,* at 641. It is therefore assumed that if the circumstances here establish a substantial likelihood – indeed, even the appearance – that Judge Cooper's refusal to reduce petitioner's sentence to probation was in retribution for the arguments made by his counsel on appeal, that is sufficient to justify the corrective exercise of the supervisory powers of the federal appellate courts.[36]

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[36] There is substantial judicial support for not requiring a defendant to prove that a trial judge was, in fact, improperly motivated. The *Patton* and *Marano* cases, *supra,* establish an objective, rather than subjective, test in specific recognition of the impossibility of ever establishing motive with certainty. As the District Court observed in *Patton*:

> To put upon the prisoner the burden of proving improper trial court motivation is like granting him the opportunity to move Parnassus with a spoon.

Patton v. United States, 256 F.Supp. 225, 235 (W.D.N.C. 1966).

The Court of Appeals in *Patton* also recognized that it is "most distasteful for federal courts to pry inside the sentencing judge's motivations to ascertain whether vindictiveness plays a role." Accordingly, that court felt it necessary to establish an absolute rule because of the "danger inherent in [such] a system," and also because even "the *appearance* of improper motivation is a disservice to the administration of justice." 381 F.2d at 641. Nevertheless, petitioner also argues that if Judge Wyatt had not erroneously denied the *coram nobis* petition, it may have been

(Cont'd.)

The circumstances of this proceeding clearly create such an appearance and do establish the existence of such a substantial likelihood. As has already been demonstrated, there were but two intervening factors between the time Judge Cooper said he might impose probation and his decision not to do so: (1) petitioner's unrebutted showing that he relied on and complied with the judge's admonition relating to charity; and (2) the nature of the appeal argued by his counsel. Against this background, the unexplained denial of probation creates the inescapable inference that the decision to deny the motion to reduce and suspend sentence was influenced by the second factor – the argument made by petitioner's counsel on appeal. *See Shear v. Boles,* 263 F.Supp. 885, 860 (N.D. W. Va.), *rev'd,* 391 F.2d 609 (4th Cir. 1967). The inference is strengthened by other evidence as well. The apology which Mr. Rifkind made to Judge Cooper, for example, both on his behalf and on behalf of Mr. Peck, made it clear that both of these experienced attorneys considered the appellate argument made by the latter a factor involved in the decision on the Rule 35 motion.[37] Moreover, government counsel requested Judge Cooper to take the appellate argument into account in determining whether to reduce and suspend the sentence.[38] In these circumstances, the already-existing inference that the refusal to reduce the sentence to probation "was in reaction to the defendant's temerity in attacking the original conviction," *Patton v. North Carolina, supra,* at 641, becomes compelling. Nor did Judge Cooper's memorandum opinion dispel the inference. He merely stated that his decision not to disturb the originally imposed sentence

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(Cont'd.)

possible to establish as a fact that Judge Cooper's decision not to grant probation was motivated by the appellate arguments critical of him.

[37] See note 17, *supra.*

[38] See pp. 15-16, and note 18, *supra.*

was reached after "long and careful consideration" and "[a]fter due deliberation."[39] In this setting, not "even the appearance of justice," *Offutt v. United States*, 348 U.S. 11, 15 (1954), has been satisfied. Indeed, this Court has observed that

> . . . fastidious regard for the honor of the administration of justice requires the Court to make certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted.

Communist Party v. Subversive Activities Control Bd., 351 U.S. 115, 124 (1956). See *Saldana v. United States*, 365 U.S. 646 (1961). In this case, however, petitioner's claim is anything but "irrational or perverse." For the facts and the express position of government counsel combine to indicate that petitioner was punished for his counsel's wholly proper arguments on appeal.

Even if this Court should not agree that petitioner has made a sufficient showing of punitive intent, the circumstances here involved call for the exercise of this Court's supervisory power, to protect the appellate processes in federal courts. The exercise of the supervisory power "does not depend upon the showing of prejudice in an individual case." *Ballard v. United States*, 329 U.S.

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[39] App. A, p. 12. His memorandum on the motion to reargue (App. A, pp. 12-13) was equally enigmatic. He said no more than that he had given a great deal of thought to the matter and had estimated "the extent of defendant's activities since imposition of sentence and weighed the justice to community and defendant alike."

In other circumstances, the reference to "the extent of defendant's activities since imposition of sentence" might be interpreted only as a reference to petitioner's charitable activities. However, the phrase is in fact ambigious. In view of government counsel's contention with respect to the motion to reargue – that what was argued by petitioner's counsel on the appeal was evidence of *petitioner's* bad character – the reference may represent acceptance of that contention. In *Marano v. United States, supra*, at 585-86, n. 3, the First Circuit stated: "If the [trial] court is taking the exceptional step of increasing a sentence following retrial, we suggest that in this circumstance its ground for doing so should be made affirmatively to appear." Petitioner submits that in the exceptional circumstances of this case as well, the trial judge should not be permitted to rely on grounds that he has not been willing to disclose.

187, 195 (1946). Instead, the Court has "an obligation that goes beyond the conviction of the particular defendant before the Court." *Sherman v. United States*, 356 U.S. 369, 380 (1958) (concurring opinion). This Court is not likely to be presented with a record which illustrates more clearly the ability of a trial judge to use his sentencing powers as an inhibitant to the appellate process.

The Court's concern for preserving the right of appeal and – to the extent possible – insulating what counsel argues on appeal from influencing the sentencing process has already been set forth above. The record in this case, however, discloses a practice which, if not corrected, will so inhibit counsel on appeal as to deny convicted defendants both due process and the effective assistance of counsel.

This danger can best be understood by putting oneself first in the place of petitioner's counsel and then in the place of counsel who in the future may be similarly situated. In this case, responsible counsel made the judgment that the principal ground for appeal from petitioner's conviction was the prejudicial nature of the judge's charge. Accordingly, the point was argued vigorously on appeal.[40] And Chief Judge Lumbard's dissent discloses, if nothing else does, that as a matter of appellate advocacy, counsel were justified in arguing as they did. At the same time petitioner followed the course of action which he and his counsel were given to believe by Judge Cooper could save petitioner from a jail sentence, even if the conviction should be affirmed. Yet he was not saved from that sentence, and the only apparently relevant intervening factor

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[40] See Brief for Appellant, *United States v. Birnbaum*, *supra* note 13. In fact, 21 pages of the argument contained in that brief were devoted to the charge, while the remaining four pages were devoted to a question of evidence.

which explains this is the criticism of the judge's conduct of the trial in the appellate argument.

Certainly in similar future circumstances equally experienced and responsible counsel will be given pause. They will have to weigh two competing considerations, which they should not have to weigh. The first would be to make an appellate argument which in their judgment has merit and which they believe their obligation to their client requires them to argue – even if it does reflect discredit on the trial judge. The second is not to make such an argument because if it ultimately proves to be unsuccessful not only is it likely to influence the trial judge's exercise of discretion when a subsequent Rule 35 motion is made, but government counsel may expressly contend that the very fact that the argument was made justifies such adverse action by the judge.

Neither criminal defendants nor their counsel should be put to such a choice. If counsel abandons the argument, much of what was determined in *Douglas v. California*, 372 U.S. 353 (1962), about the essentiality of the aid of counsel on appeal becomes a mockery. Counsel appears but remains mute on a vital question affecting his client's rights. If counsel makes the argument, he imposes upon his client a risk that should not be imposed.[41] Accordingly, the implications of this case cast such grave doubt upon the integrity of the judicial process and pose such substantial dangers to the administration of justice, that it is highly appropriate for this Court to take corrective action pursuant to its supervisory powers.

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[41] The Court of Appeals also approved Judge Cooper's invitation to petitioner to take "a calculated risk" in an "effort to persuade the sentencing judge that he should not suffer confinement." App. A, p. A-10. It surely is not proper for the trial judge to put the defendant in this kind of position, particularly at a time when it is inevitable that one of the elements that would enter into any defendant's calculations would be whether and how to take the appeal.

III

THE REMEDY

Petitioner recognizes that if this Court decides to grant certiorari and either vacates the unlawful tentative sentence imposed by Judge Cooper or determines that the circumstances call for the exercise of its supervisory jurisdiction with respect to the judge's failure to reduce the one year prison sentence to probation, there would be a number of possible dispositions available to it. For this Court is empowered to dispose of cases "as may be just under the circumstances."[42]

In petitioner's view, the most equitable and effective disposition would be to remand to the District Court with directions to impose a probationary sentence. This would be appropriate for two reasons. First, it would be the only way for this Court to be certain that petitioner is not being punished for his appeal. If petitioner had not appealed and if the judge had concluded at the

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42 The Supreme Court . . . may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

28 U.S.C. §2106. *Cf. Yates v. United States,* 356 U. S. 363 (1958). We assume, of course, that it would be improper for any trial court to impose a sentence in excess of the one year tentative sentence imposed by Judge Cooper. To permit such an increase in sentence would be to impose an absolute deterrent against any challenges to unlawful or improper sentencing processes. Even if the tentative one year sentence was invalid – as petitioner argues it was – it surely sets the outer limit for constitutionally permissible sentences. *See Patton v. North Carolina, supra; Pearce v. North Carolina, supra.*

time of the initial sentencing that "now is . . . the time" to consider the affirmative aspects of his character relevant to the imposition of sentence, petitioner's sentence would certainly have been less than a year, and most probably probation. For it must be assumed that – granted, as Judge Cooper did, the existence of such affirmative aspects of character – the sentence which was imposed was greater than what would have been imposed had they been considered. But petitioner did appeal, and the circumstances point strongly to the likelihood that Judge Cooper's refusal to reduce sentence was in retribution for what was argued on appeal. These facts simply cannot be erased. Therefore, the only way of assuring that the sentence ultimately imposed upon petitioner is not in retribution for his counsel's appellate argument would be to have him receive the sentence he likely would have received if he had not appealed.

There is substantial judicial authority for this approach in the analogous area of probation. When a trial judge imposes a condition of probation, the defendant may challenge that condition; if the reviewing court agrees with defendant's challenge, it will frequently strike the unlawful condition but affirm the sentence of probation. *See, e.g., United States v. Taylor,* 305 F.2d 183, 188 (4th Cir.), *cert. denied,* 371 U. S. 894 (1962); *Karrell v. United States,* 181 F.2d 981 (9th Cir.), *cert. denied,* 340 U. S. 891 (1950). This is a recognition of the hard fact that to do otherwise – to remand the case for de novo sentencing – would discourage defendants from challenging unlawful conditions of probation out of fear that if they "win" their point, their reward may be the imposition of a jail sentence on remand. Moreover, this Court has explicitly recognized the dangers of not giving litigants the fruits of their judicial victories. In *Stoval v. Denno,* 388 U. S. 293 (1967), the Court gave as one of its reasons why defendants "must be given the benefit" of the rules established in their cases "the possible effect upon the

incentive of counsel to advance contentions requiring a change in the law."[43]

Here, petitioner has challenged an unlawful sentence, or at least wholly improper practices affecting sentencing. If this Court remands for de novo sentencing, petitioner will have won his legal point, but lost his case, since the trial judge would still be free to reimpose the one year sentence. Such a result would work more than an injustice on the litigant in this case; it would effectively serve to discourage defendants from challenging sentencing practices of the kind at issue here.

Second, elements of ordinary fairness dictate that petitioner should be placed on probation. As the Court of Appeals apparently conceded, petitioner, as well as his lawyers and the charities in which he became active and which came to rely upon him, all understood Judge Cooper's comments at the original sentencing proceeding, as reinforced by his subsequent discussions with Justice Heller, to mean that petitioner would not be imprisoned if he followed the course of involvement in charitable activities recommended to him by Judge Cooper.

There can be little doubt that if the words Judge Cooper used connoted an express conditional promise to grant probation and petitioner followed the course of action upon which such a promise had been conditioned, the promise would be enforced.[44] Elemental standards

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[43] 388 U. S. at 301. See also Mishkin, *The Supreme Court, 1964 Term (Foreword: The High Court, The Great Writ, and the Due Process of Time and Law)*, 79 Harv. L. Rev. 56, 60-61 (1965).

[44] *See, e.g., Machibroda v. United States*, 368 U. S. 487 (1962); *Shelton v. United States*, 356 U. S. 26 (1958); *Walker v. Johnston*, 312 U. S. 275 (1942); *United States v. Taylor*, 303 F.2d 16[illegible] (5th Cir. 1962); *Hassell v. United States*, 287 F.2d 646 (9th Cir. 1961); *United States v. Gilligan*, 256 F.Supp. 244 (S.D.N.Y. 1966).

(Cont'd.)

of fairness have long dictated that the sanctity of judicial promises be enforced by the courts. This has been illustrated particularly in circumstances where a plea of guilty is obtained by what may be construed to be a judicial promise. In such circumstances "[f]undamental fairness as a concept of due process of law, requires" that the promise be honored. *United States v. Gilligan*, 256 F.Supp. 244, 249 (S.D.N.Y. 1966).

The words used by Judge Cooper in this case were, in fact, ambiguous. His statement that he "might consider" probation if petitioner complied with the charity admonition can reasonably be interpreted to mean (1) that he would impose probation but only if petitioner complied, or (2) that he might refuse to impose probation even if petitioner complied. Petitioner maintains that the first reading is the more reasonable and just. But even if this Court does not agree – even if it concludes that Judge Cooper did not use words of contract – the circumstances following the utterance of these words require that they be treated as binding.

After the judge had imposed sentence and prior to his action on the Rule 35 motion, he expressed approval of petitioner's activities by approving the specific charitable organizations with which petitioner should become affiliated and by approving the general course of petitioner's charitable activities as subsequently reported to him by the "unofficial probation officer." Therefore, if petitioner and his attorneys had grounds to interpret Judge Cooper's remarks when he imposed

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[44] (Cont'd.)

In *Butler v. District of Columbia, supra* note 33, the District of Columbia Circuit went even further. In that case, involving a whimsical and improper condition for suspension of sentence (to write an essay on respect for police), a unanimous court reversed and remanded with directions to "order the information dismissed, a disposition we deem" just under the circumstances. *Id.* at 799.

sentence, as the Court of Appeals found they in fact did, ". . . to mean that if the conviction was sustained Birnbaum could, by following the guidelines in the court's remarks, avoid imprisonment and receive probation," the judge certainly subsequently gave them additional strong support for that view.

Therefore, even if the language initially used by Judge Cooper did not amount to a literal promise, that language, taken together with his subsequent appointment of the "unofficial probation officer" and his subsequent expression of approval of petitioner's activities, combined to create a situation in which reasonable men could and did honestly believe that the judge would in fact do what he originally said he might do. In such a situation, considerations of fundamental fairness should be given the same force that they are given when a promise is literally made.[45] Those considerations make it inappropriate to conclude, as did the Court of Appeals, that petitioner took "a calculated risk" when he undertook the charitable activities suggested by Judge Cooper,[46] and then to speculate about the reasons for the judge's ultimate decision.[47]

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[45] Thus it has been held that a plea of guilty may be withdrawn if it was made upon the basis of a likely misapprehension about a judge's commitment concerning the sentence to be imposed, rather than upon an express promise from the judge. *Commonwealth v. Scoleri*, 415 Pa. 218, 202 A.2d 521, 526, 537-38 (1964). *See also Saldana v. United States*, 365 U.S. 646, 647 (1961).

[46] App. A, p. A-10.

[47] It *appears* that in the judge's eyes appellant did not make the "impressively convincing showing" that the judge felt was necessary before he could grant probation. Also, the judge did not *seem to feel* that the best interest of the public would be served by granting appellant probation.

App. A, p. A-11 (emphasis added).

The unequal positions of a judge and one accused but not yet found guilty – "one with power to commit to prison and the other deeply concerned to avoid prison," *United States v. Gilligan, supra,* at 254 – is well recognized. Even more unequal is the relationship of a judge to one already convicted but not yet sentenced. Certainly in such a situation a judge should not use his awesome power to grant or withhold liberty to impose "a calculated risk" upon a convicted defendant. Moreover, in this case that awesome power was used to impose effective controls over the life of a convicted defendant for a period of over eighteen months. *Cf. Weems v. United States,* 217 U.S. 349, 364, 382–83 (1910). It is true that the power operated to direct petitioner into good works – and he does not regret them. Nevertheless, the very fact that the judge's power was so employed emphasizes the requirement that judicial commitments – whether express or implied – be honored.[48]

In light of all the circumstances, therefore, it is petitioner's view that it would "be just" to remand the case to the District Court with directions to impose a sentence of probation.[49]

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[48] Indeed, if what was involved here was not a commitment, it had so whimsical an aspect as to bring into question whether what did occur constituted a violation of Canon 21 of the Canons of Judicial Ethics, which provides in part: "Though vested with discretion in the imposition of mild or severe sentences [a judge] should not compel persons brought before him to submit to some humiliating act or discipline of his own devising, without authority of law, because he thinks it will have a beneficial corrective influence." If it did constitute such a violation, there exists added reason for the exercise of the supervisory power.

[49] Another possible disposition would be for this Court to issue an order instructing the trial judge to impose probation *unless* it is established that petitioner failed to comply with Judge Cooper's

(Cont'd.)

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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December 3, 1968

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[49] (Cont'd.)
"condition" concerning charity. But since it appears beyond dispute that no finding of such failure could be made, it would seem unnecessary to do this. If this Court decides to remand with such an order, petitioner requests that the case be remanded to a judge other than Judge Cooper. This Court has, on previous occasions, remanded cases to "a different judge" in the "interests of justice and in the exercise of the supervisory powers of this Court." *Calvaresi v. United States,* 348 U. S. 961 (1955). See also *Offutt v. United States,* 348 U. S. 11, 17-18 (1954); *Cooke v. United States,* 167 U. S. 517 (1924); *Blunt v. United States,* 244 F.2d 355, 368 (D.C. Cir. 1957). Such action is particularly appropriate where, as in this case, the trial judge has become "personally embroiled with petitioner." *Offutt v. United States, supra,* at 17.

APPENDIX A

Opinions Below

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 378-379—September Term, 1967.

(Argued February 7, 1968 Decided October 4, 1968.)

Docket Nos. 32063-32064

UNITED STATES OF AMERICA,

Appellee,

—v.—

SAUL I. BIRNBAUM,

Appellant.

Before:

WATERMAN and FEINBERG, *Circuit Judges,*
BARTELS, *District Judge.**

Appellant who was sentenced to concurrent terms of imprisonment of one year, United States District Court for the Southern District of New York, Cooper, *J.*, moved to have his sentence reduced and suspended. The motion was denied, as was also a motion to reargue it. Appellant then applied for a rule to show cause why a writ of *coram nobis* should not issue in order to have the sentencing judge's determinations reviewed and so as to have an evidentiary hearing at which evidence could be adduced with reference to the purpose of certain remarks made by the judge when he imposed sentence. This application was denied, United

* Of the Eastern District of New York, sitting by designation.

States District Court for the Southern District of New York, Wyatt, *J.* Appeals were taken from the orders of Judges Cooper and Wyatt and were consolidated for argument. The orders are affirmed.

PETER FLEMING, JR., DOUGLAS S. LIEBHAFSKY, Asst. United States Attorneys, ROBERT M. MORGENTHAU, United States Attorney, *for Appellee.*

ARNOLD BAUMAN, MORTON SCHLOSSBERG, CHRISTY, BAUMAN, FREY & CHRISTY, JEROME LEWIS, New York City, *for Appellant.*

WILLIAM J. VANDEN HEUVEL and CHARLES G. MOERDLER, New York City, *for St. Augustine's Episcopal School, et al., Amicus Curiae.*

WATERMAN, *Circuit Judge*:

Appellant Birnbaum was convicted upon two counts, the only counts in which he was named, of a four-count indictment charging him with having conspired with others to bribe, and with having bribed, an Internal Revenue Agent. He was sentenced to serve one year on each count, the terms to run concurrently. Upon appeal to our court the conviction was affirmed, *United States* v. *Birnbaum*, 373 F. 2d 250 (2 Cir.), *rehearing denied*, 375 F. 2d 232 (2 Cir.), *cert. denied*, 389 U. S. 837 (1967).

At the time of the imposition of the sentence on April 1, 1966, the trial judge, Judge Irving Ben Cooper, knowing that Birnbaum would seek a reversal of his conviction, as he had successfully done after a prior conviction upon the

same indictment, see *United States* v. *Birnbaum*, 337 F. 2d 490 (2 Cir. 1964), addressed the following remarks to him.

> . . . In your case there are factors which should be considered in mitigation of sentence. . . .
>
> * * * * *
>
> . . . There are . . . those . . . who still believe in you, including Mr. Justice Heller, and who seem genuinely anxious about your fate.
>
> I feel compelled to make the observation that you have had only a nodding acquaintance with charity and communal affairs. . . . You amassed a fortune . . . . Yet, you gave back nothing; nothing, other than a token contribution. You gave nothing back to your school, to your community, to your country.
>
> * * * * *
>
> . . . You protest your innocence and you are on the way to appeal. Certainly that is your legal right.
>
> For the present, then, in the light of your fame [sic] of mind, let me just add that if your conviction is sustained, this Court *might*, and *I emphasize might*, upon an impressively convincing showing that you have realized, or rather realigned, your sights and devoutly wish to give a hunk of yourself as well as your wealth in doing with constancy those acts which will really help your fellow Americans and at the same time enhance you [sic] personal well-being immeasurably, I say this Court might consider . . . a program of rehabilitation without confinement as provided for by 18 United States Code, Section 3651. (Emphasis supplied.)

So for all these reasons, in mitigation of sentence, and especially in light of the additional period of an-

guish to you since the verdict on the first trial, this Court adjudges you guilty as charged and convicted, and it is adjudged that [the defendant is hereby committed to the custody of] the Attorney General or his authorized representative for imprisonment for a period of one year on each count to run concurrently with each other.

Birnbaum's attorneys interpreted the court's remarks to mean that if the conviction was sustained Birnbaum could, by following the guidelines contained in the court's remarks, avoid imprisonment and receive probation.

Judge Cooper's reference to Justice Heller prompted Birnbaum to seek out Justice Heller and ask for advice on how best to follow the course seemingly suggested by Judge Cooper's remarks. Justice Heller[1] then approached Judge Cooper at a charity dinner and mentioned Birnbaum's case and the fact that Birnbaum was troubled because he did not know what to do in light of what Judge Cooper had said at the sentencing. Judge Cooper told Justice Heller that Justice Heller could, if he wished, provide guidance for Birnbaum. Justice Heller then suggested three charities in which Birnbaum might become active, and Judge Cooper indicated that he had no objection.

Thereafter, Birnbaum, while his appeal was pending, contributed large amounts of money[2] to the charities and devoted one or two days a week to their work. This fact was mentioned when Justice Heller happened later to meet

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1 Justice Louis B. Heller is a Justice of the Supreme Court of the State of New York, Second Judicial District. Justice Heller had served as an Associate Justice of the New York City Court of Special Sessions at a time when Judge Cooper was Chief Justice of that court.

2 Birnbaum is said to have contributed $85,000 to various charitable organizations and pledged an additional $25,000 to help meet their needs.

Judge Cooper at the theater. According to Justice Heller, Judge Cooper said: "That is fine, that is good."[3]

After Birnbaum's conviction had been affirmed and certiorari to the United States Supreme Court from the Court of Appeals had been denied, Birnbaum, represented by counsel, moved Judge Cooper pursuant to Rule 35, Fed. R. Crim. P. for a reduction of the one year imprisonment term and for a suspension of the imprisonment sentence. The motion was argued at length on November 15, 1967. Decision was reserved, and Judge Cooper called for an updated probation report.[4] On December 6, 1967, Judge Cooper filed an opinion denying Birnbaum's application. He stated that he had "given long and careful consideration to all of the facts and circumstances of this case, including the defendant's background, the nature and gravity of the offense of which he stands convicted, the probation report from which we have obtained the greatest possible assistance, the papers on which this application is predicated and the presentations of learned and able counsel," and was "satisfied that the sentence imposed on April 1, 1966, should not be disturbed."

Birnbaum then moved for a reargument of this motion. Judge Cooper considered this new motion and, on January 4, 1968, denied it after "estimating the extent of defendant's activities since imposition of sentence and weighing the justice due community and defendant alike . . . ." Birnbaum timely appealed from this order.

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3 During the hearing before Judge Wyatt it was stated by counsel that Justice Heller had said that Judge Cooper had so remarked.

4 Apparently this was the first official probation report prepared by an officer of the probation service of the Southern District of New York. The probation officer interviewed Birnbaum twice before submitting his report to Judge Cooper.

On January 23, 1968, Birnbaum applied to the district court for an order to show cause why a writ of *coram nobis* should not be granted, to review and correct the sentence so as to place Birnbaum on probation, and, in any event, why, inasmuch as Birnbaum was challenging the legality of Judge Cooper's act, a hearing should not be had at which Judge Cooper would be a summoned witness, to present the relevant facts to the court. This application was heard on January 27 by Judge Inzer Wyatt who promptly denied it after extensive oral argument. This order has been appealed to this court.

The two appeals have been consolidated, several stays of execution have been granted, and appellant has not yet commenced to serve his sentence of imprisonment.

Appellant first contends that he has been serving a suspended sentence and has legally been a probationer since April 1, 1966; therefore Judge Cooper's orders directing that appellant's prison sentence be served constituted an illegal revocation of probation. 18 U. S. C. §§3651-3656. Appellant maintains that Judge Cooper's sentencing statements and subsequent actions have shown a judicial intention to invoke the provisions of the Federal Probation Act and to place appellant on a probationary status. Of course Judge Cooper's actions failed to comply with the requirements of the Federal Probation Act, 18 U. S. C. §§3651-3656 which appellant admits, but appellant argues that the Federal Probation Act is a remedial statute which must be liberally construed, e.g., *Scalia* v. *United States*, 62 F. 2d 220, 223 (1 Cir. 1932); *Reeves* v. *United States*, 35 F. 2d 323, 325 (8 Cir. 1929); *Nix* v. *James*, 7 F. 2d 590, 592 (9 Cir. 1925), and liberal construction of the Act permits the status of probation to exist under the Act even though the technical requirements that are prerequi-

sites under the statutes authorizing the act of grace are not fulfilled. *McHugh* v. *United States*, 230 F. 2d 252 (1 Cir.), *cert. denied*, 351 U. S. 966 (1956); *Campbell* v. *Aderhold*, 36 F. 2d 366 (N. D. Ga. 1929).

This contention must be rejected. Judge Cooper's statements at appellant's sentencing do not reflect any present intention to place the appellant on probation. At most, the statements only contain an intimation that if appellant made an "impressively convincing showing" of a change in attitude and character before the jury's verdict received the final approval of the appellate courts the sentencing court *might then* consider suspending the appellant's sentence of imprisonment and might grant probation. The lack of a clear, present intent at the time of sentencing to impose some form of probationary status distinguishes the present case from those cited by appellant. See *McHugh* v. *United States, supra; Campbell* v. *Aderhold, supra.* Both *McHugh* and *Campbell* involved situations where the sentencing judge obviously intended to place the convicted person on probation but failed to articulate his intentions unambiguously.

Judge Cooper's and Justice Heller's private conversations at social gatherings do not materially aid appellant's contentions. Even if intended to result in probationing appellant, the conversations could not have had that legal effect. Liberal construction of the Federal Probation Act does not permit a complete disregard of the technical requirements of the Act. The Act expressly contemplates extensive investigation of an accused's background by the probation service of the court before probation may be initially authorized, and close supervision thereafter by a person formally appointed by the court for that purpose, see 18 U. S. C. §3654, who usually is an officer of the pro-

bation service. See 18 U. S. C. §§3651-3656; Rule 32, Fed. R. Crim. P. To allow the status of probation to be formulated and administered during purely social gatherings would not only cause a great deal of enforcement uncertainty but would be contrary to the general policies underlying the Act. Furthermore, Justice Heller's private conversations with Judge Cooper only reflect Justice Heller's willingness to aid appellant in achieving the necessary change in his character which might merit a later grant by Judge Cooper of probationary grace. Judge Cooper's replies to Justice Heller's comments only show that he had no objection to Justice Heller's activities on behalf of Birnbaum.

A complete and thorough reading of the record reveals that until the *coram nobis* hearing before Judge Wyatt neither appellant nor anyone who had been present at the sentencing of Birnbaum believed that Judge Cooper had then indicated that Birnbaum had been granted probation. The fact that certain leaders of the charitable organizations Birnbaum was aiding may have erroneously believed that Birnbaum's sentence had been suspended when the sentence was imposed has little bearing on the meaning of Judge Cooper's sentencing remarks.[5] It is indeed possible that appellant and his attorneys may have misinterpreted Judge Cooper's language relative to any possible future judicial action, but any such unfortunate misconceptions of appellant and others could not reasonably create in anyone's mind a belief that appellant was serving his sentence pending adjudication of his appeal from his conviction. There

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5 A number of charitable organizations, in which Birnbaum was active, submitted letters and affidavits below requesting that Birnbaum be *continued* on probation. Counsel representing charities assisted by Birnbaum was permitted to file briefs and to argue in the district court and in the Court of Appeals.

just was no language indicating Birnbaum was to enjoy probationary status under the Act, only that execution of the imprisonment sentence was to be stayed pending appeal.

Appellant next contends that if his appeal from his conviction was of no avail Judge Cooper conditionally promised him probationary grace if he "realigned his sights," that he relied on that promise, and that the protection of the integrity of the judicial system dictates that this promise be fulfilled. A careful reading of Judge Cooper's statement, however, reveals no conditional promise that appellant's imprisonment sentence would be suspended but only a suggestion that probation remained a feasible possibility. After having been convicted by juries at two trials appellant may well have overly reacted to the faint glimmer of hope offered by the judge's statement. But appellant's state of mind is irrelevant; that he may have been misled by his own wishful thinking or by the overly optimistic advice of counsel provides no basis for the relief he seeks. Cf., *Sasser* v. *United States,* 352 F. 2d 796 (6 Cir. 1965), *cert. denied,* 385 U. S. 883 (1966).

Even conceding that a vague conditional promise could be extracted from Judge Cooper's statement, Judge Cooper unambiguously reserved the power to reassess the situation and decide whether, after Birnbaum's conviction had become final, probation would be inappropriate in light of all relevant factors, including that of appellant's behavior while his appeal was pending. Probation is not a matter of right, or a contract; it is a matter of grace, e.g., *Burns* v. *United States,* 287 U. S. 216, 220 (1932); *Fox* v. *United States,* 354 F. 2d 752, 754 (10 Cir. 1965); *Bryson* v. *United States,* 265 F. 2d 9 (9 Cir.), *cert. denied,* 360 U. S. 919 (1959); *United States* v. *Gerson,* 192 F. Supp. 864 (E. D.

Tenn. 1961), *affirmed,* 302 F. 2d 430 (6 Cir. 1962), and it should only be granted when both the individual's and the public's interests will be best served by the suspension of sentence. See *Toyosaburo Korematsu* v. *United States,* 319 U. S. 432, 435 (1943); *Kirsch* v. *United States,* 173 F. 2d 652 (8 Cir. 1949); *United States* v. *Nix,* 8 F. 2d 759 (S. D. Cal. 1925); *United States* v. *Durkin,* 63 F. Supp. 570 (N. D. Ill. 1945).

Birnbaum further asserts that fundamental ideas of fairness demand that he be placed on probation because he was misled by Judge Cooper's remarks and actions. But Birnbaum did not lose any basic rights by following the advice of Judge Cooper. He was not induced to plead guilty by the judge's alleged promise of probation. See, e.g., *Machibroda* v. *United States,* 368 U. S. 487 (1962); *Shelton* v. *United States,* 356 U. S. 26 (1958); *Walker* v. *Johnston,* 312 U. S. 275 (1941). Birnbaum was convicted by a jury after a full and fair trial. Birnbaum may indeed have devoted much time and effort and have contributed large sums to charities in the hope that these activities might keep him free from confinement. That was a calculated risk that he undertook in an effort to persuade the sentencing judge that he should not suffer confinement, an effort that proved fruitless.

Lastly, appellant contends that the unusual circumstances of this case dictate that this court should either formalize a probationary status for him or order that the court below issue a writ of *coram nobis* with the resulting evidentiary hearing. Basically, the appellant appears to believe that Judge Cooper abused his discretion by not granting appellant probation after dangling the possibility of probation before him if he "realigned his sights," which the judge's statement induced him to do.

We see no abuse of discretion on the part of Judge Cooper or any need for any further investigation in this matter. Judge Cooper appears to have given long and detailed consideration both to the appellant's original one year imprisonment sentence and to appellant's subsequent motion for a reduction and a suspension of that sentence. It appears that in the judge's eyes appellant did not make the "impressively convincing showing" that the judge felt was necessary before he could grant probation. Also, the judge did not seem to feel that the best interest of the public would be served by granting appellant probation.

The question before us for decision is not whether this court or another sentencing judge might have reacted differently to the request for modification of the sentence. Absent an abuse of discretion, Judge Cooper's determination must stand and cannot be disturbed on appeal. E.g., *Heath* v. *United States,* 375 F. 2d 521 (8 Cir. 1967); *United States* v. *Piccioli,* 352 F. 2d 856, 859-860 (2 Cir. 1965); *Mount* v. *United States,* 333 F. 2d 39, 45 (5 Cir.), *cert. denied,* 379 U. S. 900 (1964); *Pependrea* v. *United States,* 275 F. 2d 325, 329-330 (9 Cir. 1960); *Roth* v. *United States,* 255 F. 2d 440 (2 Cir.), *cert. denied,* 358 U. S. 819 (1958); *United States* v. *Rosenberg,* 195 F. 2d 583, 603-609 (2 Cir.), *cert. denied,* 344 U. S. 838 (1952).

Moreover, there being no abuse of discretion which would permit appellate reversal of the sentencing judge's decision to adhere to the unreviewable sentence he had originally imposed, it would also be improper to permit review through the use of a collateral method, such as a writ of *coram nobis.*

Affirmed.

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

"This Court has given long and careful consideration to all of the facts and circumstances of this case, including the defendant's background, the nature and gravity of the offense of which he stands convicted, the probation report from which we have obtained the greatest possible assistance, the papers on which this application is predicated, and the presentations of learned and able counsel. After due deliberation, this Court is satisfied that the sentence imposed on April 1, 1966, should not be disturbed. Application denied.

So Ordered:

Irving Ben Cooper
United States District Judge

New York, New York
December 6, 1967"

"I have been deeply moved by the utter sincerity of the advocates on both sides of this application for reargument; by the touching show of faith demonstrated by those who affixed their signatures to earnest statements in defendant's behalf; and by those high-minded citizens who called on me to attest their belief in his potential for good.

"Upon reflection seemingly without end, and after estimating the extent of defendant's activities since imposition of sentence and weighing the justice due community and defendant alike, on the merits I am constrained to and do grant the motion for reargument,

and upon such reargument adhere to the denial entered upon the original application on December 6, 1967.

So Ordered:

New York, N. Y.
January 4, 1968

Irving Ben Cooper
U.S.D.J."

"This application is denied after hearing in open Court January 27, 1968"

Inzer B. Wyatt
U.S.D.J.

January 27, 1968

APPENDIX B

Constitutional Provisions, Statute and Rule Involved

U. S. Constitution
Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

18 U.S.C. § 4208(b), 72 Stat. 845

If the court desires more detailed information as a basis for determining the sentence to be imposed, the court may commit the defendant to the custody of the Attorney General, which commitment shall be deemed to be for the maximum sentence of imprisonment prescribed by law, for a study as described in subsection (c) hereof. The results of such study, together with any recommendations which the Director of the Bureau of Prisons believes would be helpful in determining the disposition of the case, shall be furnished to the court within three months unless the court grants time, not to exceed an additional three months, for further study. After receiving such reports and recommendations, the court may in its discretion: (1) Place the prisoner on probation as authorized by section 3651 of this title, or (2) affirm the sentence of imprisonment originally imposed, or reduce the sentence of imprisonment, and commit the offender under any applicable provision of law. The term of the sentence shall run from date of original commitment under this section.

Federal Rules of Criminal Procedure

Rule 35

The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence. The court may reduce a sentence within 120 days after the sentence is imposed, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction. The court may also reduce a sentence upon revocation of probation as provided by law.

SUPREME COURT, U. S.

FILED

DEC 11 1968

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 792

SAUL I. BIRNBAUM,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

BRIEF, *AMICUS CURIAE*, SUBMITTED, WITH THE CONSENT OF THE SOLICITOR GENERAL, IN SUPPORT OF THE ABOVE-CITED PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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On December 3, 1968, Saul I. Birnbaum (Birnbaum) petitioned this Court to issue a writ of certiorari to review a judgment of the United States Court of Appeals for the Second Circuit entered October 4, 1968 in a consolidated appeal entitled *United States of America, Appellee,* v. *Saul I. Birnbaum, Appellant* (Docket Nos. 32063-32064).

With leave of the District Court and the Court of Appeals, St. Augustine's Episcopal School, The United Cerebral Palsy Association of Nassau County, Inc., The Hillel School of the Shore Area, Pride of Judea and The Brooklyn Philharmonia, Inc., appeared below *amicus curiae* in support of Birnbaum's application and appeal. With

the consent of the Solicitor General of the United States, they file this brief, *amicus curiae,* in support of Birnbaum's aforesaid petition.

Opinions Below

The opinion of the Court of Appeals for the Second Circuit was issued on October 4, 1968, but is as yet unreported. It is annexed to the Birnbaum petition as Appendix A. The orders of the United States District Court for the Southern District of New York dated (1) December 6, 1967, denying Birnbaum's motion to reduce and suspend sentence pursuant to Rule 35 of the Federal Rules of Criminal Procedure, (2) January 4, 1968, adhering to the decision embodied in the earlier order, and (3) January 27, 1968, denying an order to show cause why a writ of *coram nobis* or in the nature of *coram nobis* should not be granted, are contained in the record certified to this Court and are set forth at pages A-12 to A-13 of Appendix A to the Birnbaum petition.

Jurisdiction

The judgment of the Court of Appeals was entered on October 4, 1968. On October 23, 1968, Mr. Justice Harlan granted Birnbaum an extension to December 3, 1968, of his time to file his petition. This brief is filed with the consent of the Solicitor General of the United States. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

Are a defendant's constitutional rights violated, or are the standards established by this Court under its supervisory powers to assure the fair administration of justice violated:

(1) where probation was conditionally promised by the trial court at the time of sentencing if the defendant embarked upon a specified program and where that judicial promise was not kept although the defendant complied in every respect with the trial court's edict respecting such program, and such compliance has never been challenged; and

(2) where such sentence in the circumstances of this case offends "civilized standards of procedure" and principles of the "fair administration of justice" in that (i) a defendant is, by the prospect of avoiding possible imprisonment, improperly enticed into embarking upon an extra-judicial course which he has no legal obligation to pursue and (ii) substantial and responsible segments of the community are, by the inducement that they can thereby advance the public interest in the rehabilitation of criminal offenders, invited by the Court into joining in such program, only to find that, though rehabilitation has been effected, the promise is not to be fulfilled for reasons never specified, thereby compromising the integrity of the judicial process.

Constitutional Provisions, Statutes and Rules Involved

Involved here are the Fifth, Sixth and Eighth Amendments to the Constitution of the United States; 18 U. S. C. §4208(b), 72 Stat. 845; and Rule 35 of the Federal Rules of Criminal Procedure, the texts of which are set forth in the Appendix to the Birnbaum petition to this Court. Additionally, there is involved the supervisory authority of this Court over the administration of justice in the federal courts.

Statement

Six charitable, social service and civic organizations appear *amicus curiae* in support of the Birnbaum petition. They do so because the trial court (United States District Court Judge Irving Ben Cooper) by its sentence of Birnbaum invited them to become the vehicle for Birnbaum's rehabilitation. As found by the Court of Appeals, the charities were, by Judge Cooper's statements at sentencing and his subsequent actions, led to believe that probation was promised, if not already conditionally granted, provided only that the rehabilitation program proved successful (A-8, esp. n. 5*). The standard established by Judge Cooper to measure the success of the program was expressly stated to be a showing that Birnbaum had realigned his sights and devoutly wished to give a hunk of himself and of his wealth to doing with constancy those acts which would help his fellow Americans and at the same time enhance his personal well being immeasurably (A-3). Against

* References preceded by "A-" are to pages of Appendix A to the Birnbaum petition, at which pages is set forth the opinion of the Court of Appeals.

that standard, the charities, in recognition of their responsibility to society, initiated the program. They involved Birnbaum in their activities and as increasingly he demonstrated by his deeds that he devoutly wished to meet the court's standards his responsibilities were enlarged, as was the charities' reliance upon him in the discharge of their functions. He gave of his wealth in full measure. We are not here, however, simply because by so doing he met that standard set by the court. Neither are we here because for more than eighteen months he has given so fully of his time, effort, energy and imagination, although in so doing he has far exceeded that standard set by the court. We appear as *amicus curiae* because by his deeds Birnbaum has to this day continued to demonstrate that he is prepared with constancy to perform, as he has performed, those acts which will really help his fellow Americans and thereby enhance his own well being immeasurably. We appear as *amicus curiae* because we know from continuing experiences over an eighteen month period that Birnbaum has, indeed, realigned his sights and because we are confident that he will continue to act as a useful and constructive member of society not merely during the term of his promised probation but for the remainder of his life.

By every objective criterion, Birnbaum has merited the promised probation held out to him by the trial court. By every objective criterion, Birnbaum has merited the confidence of the charities as spokesman for society and they, in turn, have the duty to remind the Court, if reminder be necessary, that even handed justice compels that the promise of probation made to the charities and to Birnbaum now be honored. In so doing the charities do not urge that Birnbaum escape punishment for the crime of which he stands convicted. Rather, they urge that the punish-

ment be that which the trial court found at sentencing to be appropriate under all the circumstances, namely the promised probation.

A. *The Circumstances Giving Rise to This Proceeding.*

1. The Court's involvement of the charities in its program to rehabilitate Birnbaum.

The charities first became involved with Birnbaum and with these proceedings in May, 1966.* New York State Supreme Court Justice Louis B. Heller, long a leader in the civic and community life of New York, then approached United Cerebral Palsy Association, Brotherhood-In-Action and Menorah Home & Hospital for the Aged and advised them fully of the circumstances of Birnbaum's conviction and of the precise text of Judge Cooper's statements at sentencing. Specifically he called to their attention Judge Cooper's remarks at sentencing that Birnbaum had "not accepted the jury's verdict and faced up to its import"; that he protested his "innocence" and was "on the way to appeal"; that Judge Cooper had expressly stated that in his opinion Birnbaum clearly was not "a callous, insensitive human, one totally devoid of decent behavior"; that "I [Judge Cooper] do not regard you as beyond recall"; that Birnbaum certainly was not "beyond rehabilitation"; but that, in view of his pending appeal, "now is not the time to explore that phase". Justice Heller called to the charities' attention and they expressly recall then noting Judge Cooper's ruling at sentencing that "[f]or the present, then, in the light of your f[r]ame of mind, let me just add that if your conviction is sustained, this Court

* All of the factual statements herein were found, without challenge, to be correct by the Courts below and, indeed, they were incorporated in substantial part in the opinion of the Court of Appeals.

might, and I emphasize might, upon an impressively convincing showing that you have realized, or rather realigned, your sights and devoutly wish to give a hunk of yourself as well as your wealth to doing with constancy those acts which will really help your fellow Americans and at the same time enhance you[r] personal well being immeasurably, I say this Court might consider . . . a program of rehabilitation without confinement as provided for by 18 United States Code, Section 3651." Alternatively, and "for all these reasons", a one year term of confinement would issue.

Justice Heller told the charities that following sentencing he had met with Judge Cooper, that at Judge Cooper's suggestion he had agreed to act as Birnbaum's "unofficial probation officer" * and that the two Judges had agreed on a basic pattern for Birnbaum's rehabilitation along the lines proposed by Judge Cooper at the sentencing. Justice Heller added that, subject to the approval of those organizations, he and Judge Cooper had agreed that Brotherhood-In-Action, United Cerebral Palsy and Menorah Home & Hospital for the Aged were appropriate organizations in

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* In the sentencing statement Judge Cooper had referred to Justice Heller as one who had faith in Birnbaum and seemed genuinely concerned about his fate. Birnbaum, accordingly, went promptly after sentencing to Justice Heller to seek his advice as to how best to comply with the course thus charted by Judge Cooper.

After reviewing the minutes of sentencing, Justice Heller, in turn met with Judge Cooper (with whom he had served on the New York City Court of Special Sessions), and pointed out to him that Birnbaum felt he required guidance in determining the means for complying with Judge Cooper's directive. Judge Cooper then told Justice Heller:

> "Well, if he doesn't know, why don't you guide him? You have had a great deal of experience in charitable endeavors. So why don't you act as his unofficial probation officer and show him the ropes."

Justice Heller agreed to act in that capacity.

whose programs and activities Birnbaum should become involved.

Against that background, Justice Heller specifically inquired whether, in light of those facts and particularly Judge Cooper's promised rehabilitation-probation program, the charities would accept Birnbaum's involvement in their activities.

Following that report and inquiry, each of the charities separately conducted lengthy personal interviews with Birnbaum to determine, in the words of Presiding Justice George Beldock of the Appellate Division of the New York State Supreme Court and founder of Brotherhood-in-Action, "whether he [Birnbaum] could fit into the structure of 'rehabilitation' so poignantly expressed at the time of sentence." (See Appendix F hereto). The organizations then agreed to accept Birnbaum and to involve him in their activities, relying upon Judge Cooper's statements at sentencing. The organizations agreed thus to participate because they viewed it to be their responsibility to the Courts and society to partake in, as viewed by Justice Beldock, an approach that was "a pioneering, novel and humane one—truly in the best tradition of our new concept of sentencing psychology."

St. Augustine's Episcopal School in the Bedford-Stuyvesant section of Brooklyn, Pride of Judea, Hillel School and the Brooklyn Philharmonia became involved with Birnbaum and these proceedings under slightly different circumstances. At or about the time Justice Heller was meeting with the group of charities he and Judge Cooper had agreed to invite to participate in Birnbaum's rehabilitation, Birnbaum sought out for himself these four additional organizations, thereby to demonstrate that he approached

the opportunity offered him by Judge Cooper as a serious, full-time and meaningful path to achieve the rehabilitation which Judge Cooper had prescribed. Those organizations were similarly advised of Judge Cooper's sentencing statements, the charted program of rehabilitation-probation and, based thereon and following lengthy interviews with Birnbaum, they too agreed to involve Birnbaum in their activities. As hereinafter more fully appears, Justice Heller was advised by Birnbaum of the additional activities he had thus undertaken and Justice Heller reported thereon and secured approval thereof from Judge Cooper.

2. The Rehabilitation-Probation Program. Having thus committed themselves to become the vehicles for Birnbaum's rehabilitation, the organizations assigned to him specific and, from their viewpoint, important tasks. They did so, as observed by Justice Beldock on behalf of Brotherhood-In-Action, against the background that the course charted by Judge Cooper "presented somewhat of a challenge for me, for our cause and for society in general."

The tasks assigned Birnbaum were many, varied and time consuming, involving, over a period of some 18 months, an average of two to three full working days each week. Additionally, Birnbaum contributed $85,000 to the various organizations, pledging an additional $25,000 to help meet their pressing needs.*

(a) *United Cerebral Palsy Association of Nassau County.* This organization provides teaching, rehabilitation and medical services to Cerebral Palsy sufferers.

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* Although not before this Court on this record, Birnbaum has continued to give a major portion of his time, effort and imagination to these charities, as well as significant additional sums of money.

Birnbaum's activities while undergoing "rehabilitation" through the aegis of the Association were, as appears from Appendix A hereto, of such magnitude that they merited his election as a Director of the Association with full knowledge of all concerned as to the circumstances of his involvement. Such activities were reported to Judge Cooper in a letter addressed to him under date of December 22, 1967, by Dr. Sidney Marks, Executive Director of the Association (Appendix A hereto), a portion of which appears below*:

"...

"Saul Birnbaum for more than a year has deeply involved himself in our efforts in behalf of cerebral palsied children and adults. *Your admonition to Mr. Birnbaum—opening, as it did, new and to him unknown vistas of communal service—initiated a program of rehabilitation for Mr. Birnbaum so effective, imaginative and novel that it has commanded the respect and enthusiastic endorsement of those of us who have come to know of it.*

It is my sincere belief that the whole of the story of Mr. Birnbaum's communal efforts have not been told to your Honor. *I, for instance, know that no one has ever approached me nor anyone at the Center, to learn from us those facts which I am sure your Honor would want to know about Saul Birnbaum's endeavors during the past year or more; the knowledge of which*

* Each of letters from the several charitable and social services organizations referred to herein were directed to Judge Cooper following his peremptory decision of December 6, 1967 that the sentence of imprisonment be executed forthwith, and in connection with the unsuccessful motion for reconsideration thereof. As herein more fully appears, none of the organizations had then, or at any subsequent point in time, been contacted by the official Court probation officer to whom Birnbaum had reported, nor, despite their request therefor, were they ever afforded the opportunity to report orally and in detail to the Court upon the rehabilitation program in which they had thus become involved by the actions of the Court.

facts I am sure your Honor would consider important in the making of a determination.

You have provided living proof, Sir, that there are no obstacles which cannot be overcome to restore a person as a resource to the community. I most respectfully urge you to reconsider your most recent decision [and] to permit the continuation of Mr. Birnbaum's rehabilitation process, to his and the community's immeasurable benefit. I ask your Honor to consider what Saul Birnbaum has already done and can do, for us.

No consideration of the effectiveness and the wisdom of your Honor's prescription for rehabilitation can be complete unless it includes our experience with Mr. Birnbaum at Cerebral Palsy. With his guidance, through his foresight, imagination, and because of his deep concern with our problem, we are moving toward our goal when the handicapped and their families will have been relieved of one of the greatest sources of their anguish.

When Saul Birnbaum first came to our center, he met many of the parents whose daily lives are affected by the pain and the suffering of their cerebral palsied children. Birnbaum spoke to these parents, and quickly recognized that the heaviness of their hearts and their day-to-day anguish, however, terrible, was less than their overwhelming concern for the future of their handicapped children. Somehow, they felt, they could cope with the present, and so long as they lived, somehow provide for the care of their youngsters. But they are overwhelmed by the contemplation of the future. Too often we hear the heartbreaking question, 'What will happen to our children when we are gone? Who will take care of them?' The brutal fact is, Judge Cooper, that nowhere is there a full-time residential care facility for the cerebral palsied.

Saul immediately suggested, fully committed, and pledged himself to the establishment of a full-time residential and treatment center for palsied orphans. At

once he set in motion the machinery to plan and build the necessary residential center for these tragedy-stricken people. He has devoted countless hours to this task. The program embraces a new center that will provide for the social, medical and rehabilitative needs of the palsied. So diligent has his work on this experimental program been, that we are already close to the start of construction.

We sincerely believe that this center will be a model for the entire country. For the first time, the multi-handicapped will face the future without fear of total abandonment.

In addition to the residential center, Saul has devoted considerable time to the expansion of our medical wing. Cur Medical Center is a key portion of our facilities. We are planning a major expansion of this medical wing, with provisions for added staff and patients.

Despite the many problems and tensions of this past year, we have made significant advance in the area of attaining financial security. Much of this progress has been a result of Saul Birnbaum's direct efforts. His studies of the problem and his recommendations have proven invaluable. The demands upon Saul's time have been great; there have been frustrating and innumerable committee meetings, phone calls and conferences, which only a charity can command and the charitably-inclined can provide. Saul Birnbaum has given unstintingly of himself in this endeavor. He assumed the chairmanship of our Journal, which has just come to a successful conclusion. The funds raised through his efforts are making it more possible for us to do our job at Cerebral Palsy.

I am sure that when your Honor reviews Birnbaum's massive effort in our behalf—the establishment of the residential center, expansion of our Medical Wing, creation of a program for endowment funds, and his contribution of time and money to help

solve our financial problems, you will agree with me that Mr. Birnbaum is a man not only of ability, but of true compassion and dedication.

It would be impossible for me to recount all that Saul Birnbaum has meant to us. The road, of our cerebral palsied and their families, is a long and hard one to travel, but the goal makes the difficult journey worth while. I most sincerely ask that you help us by exercising your judicial power with compassion, and permit Saul Birnbaum to *continue* his good work with us." (Emphasis supplied).

(b) *St. Augustine's Episcopal School,* this well-known institution, located in the heart of the Bedford-Stuyvesant section of Brooklyn, educates more than 300 Negro children drawn primarily from one of the nation's most critical poverty areas. There, Birnbaum helped in the development of curriculum and community service programs, aided in the reorganization of its school camp facilities, pioneered in the development of an intensive remedial reading program and played the primary role in the maintenance and expansion of the school's facilities. Because of his labors and merit and with full knowledge of his background and the circumstances under which he became involved in the works of St. Augustine's, Birnbaum was designated a member of the School's Board of Advisors, serving on that Board with the Brooklyn District Attorney and an Assistant Secretary of State of the United States. More importantly, Birnbaum merited by his deeds the designation as St. Augustine's "Man of the Year" for 1967, a particular honor for a white man in a black community at a time when Bedford-Stuyvesant, like other ghetto communities, was torn by racial strife. The children of St. Augustine's were so advised (*infra,* p. 22) and they in turn conveyed the message of hope to others in their community. Attached hereto

as Appendix B is a copy of a letter written on December 21, 1967, by Father Jacobs, the Principal of St. Augustine's, to Judge Cooper reporting on the rehabilitation of Birnbaum and his continuing involvement in and importance to St. Augustine's and those it serves.*

(c) *Hillel School.* At the Hillel School, an institution designed to provide a thorough Jewish education combined with a full program of secular studies, Birnbaum reorganized the school's financial structure, led efforts to meet the school's increasing enrollment, acted as Chairman of its Endowment and Development Fund Program, assisted in the construction of additional classroom facilities and secured the development of a scholarship program to which he made significant contributions. His devotion, interest and industry led to his knowing election to the School's Board of Directors. Attached hereto as Appendix C is a copy of the letter written to Judge Cooper on December 22, 1967, by Rabbi Morris Schmidman, Dean of the Hillel School.

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* As we have previously observed, each of the charities, by reason of the trial court's promise and Birnbaum's meaningful efforts, immersed him deeply in their activities and increasingly relied upon him. That Birnbaum became and is a mainstay of the charities is illustrated by the following excerpts from Father Jacob's above-mentioned letter to Judge Cooper:

> "... We wanted you to know that we are distraught over the decision [to now imprison Birnbaum despite his rehabilitation and the promised probation] and are praying that he may be spared to continue his work. We are so desperately in need of his advice and assistance: If we do not now conclude the transaction for our new building, we will forever lose the opportunity. We rely so heavily on Saul.
>
> If you send him to prison, our school plans will collapse. Our fond hope of many years will again become a frustrating hope instead of a reality."

Birnbaum has to this day continued to aid St. Augustine's in its efforts to provide both the facilities and the teaching tools to meet the ever-increasing educational needs of the Bedford-Stuyvesant community.

(d) *Pride of Judea.* This organization is one designed to meet urgent community needs in the areas of child and family welfare, particularly in connection with emotionally disturbed children. As soon as Birnbaum had been accepted to become involved in the works of Pride of Judea, the President of that organization, Judge Maurice Bernhardt of the New York State Family Court, designated Birnbaum to its Professional Services Committee and assigned him the responsibility for development of a coordinating council of all agencies providing assistance to emotionally disturbed and retarded children. His efforts also included the financing and establishment of a clinic for the treatment of a condition known as "school phobia", a clinic which seeks to provide corrective treatment for emotionally disturbed children and to condition them for their return to the public school system. Birnbaum's many contributions to this organization were recognized by the designation of the special classes for "school phobia" in his honor, his being designated as guest of honor for one of its major affairs and the suggestion by the Board of Directors that he be a 1967 medal recipient. Attached hereto as Appendix D is a copy of Judge Bernhardt's written report to Judge Cooper, dated December 22, 1967, detailing Birnbaum's continuing and massive efforts on behalf of Pride of Judea under the rehabilitation program and Judge Bernhardt's views on the success thereof from the viewpoint of society and Birnbaum. As stated by Judge Bernhardt:

> "With Mr. Birnbaum, it has been my experience that no task is ever too small or too great for him to tackle and he has devoted a major portion of his time to us on a continuous basis. Our organization's outstanding men and women, have great regard for Mr. Birnbaum and find him almost indispensable as a leader and supporter of our very important service.

It would indeed be a tragedy for our children if Mr. Birnbaum's efforts were interrupted. His confinement would remove one of our most ardent supporters and deal a terrible blow to our programs. I do not refer to Mr. Birnbaum's financial generosity alone. I refer to his active participation, guidance and wisdom in helping us plan for the future."

(e) *Menorah Home & Hospital for the Aged.* Through its Brooklyn Center, this organization provides services to the aged and offers housing and hospital facilities, psychiatric training and service programs. Following initial indoctrination in the works of the institution by Justice Heller, Birnbaum was assigned, among other functions, overall fund-raising responsibilities and, through stint of effort, Birnbaum raised three-fold the sum previously secured. Birnbaum's knowledge and technical ability in the nursing home field, as well as his expertise in the areas of finance and administration, were employed by him on Menorah's behalf as part of the continuing rehabilitation-probation program. Attached as Appendix E hereto is a copy of the written report made to Judge Cooper, on December 23, 1967, by Arthur Gottlieb, Vice President of Menorah.

(f) *The Brooklyn Philharmonia, Inc.* is devoted to the cultural development of underprivileged children. Shortly after his introduction to its activities, Birnbaum sponsored, planned and financially supported a concert for 1,500 underprivileged children. His significant contributions in terms of time, effort and moneys—including the development of a program contemplating free music instruction for talented but underprivileged children—was recognized by his appointment as a Director of the organization.

(g) *Brotherhood-in-Action.* As previously observed this organization was founded over a quarter century ago by

Justice Beldock to foster, through various concrete programs, means for dealing with racial, religious and intergroup tensions, and their underlying causes. Birnbaum actively participated in the organization's work toward development of low cost housing.

Perhaps the best summary of how the rehabilitation-probation program came to be initiated, the understanding of the participants that it was a judicially sanctioned program and that all of the participants therein clearly believed it had been successfully conducted from the viewpoint of society as a whole, is stated in the letter written, on November 13, 1967, to Judge Cooper by Justice Beldock, a copy of which letter is annexed hereto as Appendix F. As stated by Justice Beldock, an esteemed jurist and humanitarian:

> "His [Birnbaum's] deep interest in our programs and his willingness to serve and to contribute of his time, effort and resources have been most gratifying. Having observed his selfless zeal in our work and the sincere manner of his conduct and his endeavor to serve his fellow man, I venture to predict that if permitted he will continue throughout his lifetime to take this type of genuine interest in causes such as ours, and others, which seek to alleviate the suffering, the impoverished, the underprivileged and the disadvantaged in our communities and in the nation."

3. The "Unofficial Probation Officer's" Report. The foregoing discussion merely capsulizes the many, varied and critically important efforts, in terms of time, imagination and effort, expended by Birnbaum over a period of 18 months as part of the program launched by Judge Cooper. On the average of several times a month, Birnbaum reported to Justice Heller upon his activities, keeping him apprised of his efforts to comply with Judge Cooper's directive.

After the commencement of the program outlined above, Justice Heller again met with Judge Cooper and reported in substance: "As the unofficial probation officer of Birnbaum, I would like to inform you that Birnbaum has become actively and financially identified with the three organizations we talked about and [is] putting his heart and soul into all their activities." Justice Heller also advised Judge Cooper of Birnbaum's further efforts to discharge the mandate by involving himself wholeheartedly with further charitable activities through the vehicle of St. Augustine's and the other above-mentioned organizations, to the extent that he had become a mainstay of each of those organizations. Judge Cooper replied: "That's good, that's fine."

On November 13, 1967, Justice Heller wrote to Judge Cooper as follows:

> "I respectfully submit this letter in the hope that it will be of assistance to you in connection with the defendant's present application before you [Birnbaum's first application for reduction in sentence pursuant to Rule 35 of the Fed. Rules of Crim. Proc.].
>
> I am familiar with the statements made by you at the time the defendant was sentenced. Mindful of the perceptive and wise remarks you then uttered, I undertook, as a friend, to help guide the defendant toward a path of service and dedication to the community and his fellow man. I introduced him to the leaders of three (3) outstanding communal and charitable endeavors, but not without first explaining to these men the nature of his conviction, and of your statement. These gentlemen, after meeting and talking with him at great length on several occasions, eventually agreed to invite him to participate in the charitable activities with which they were identified.
>
> I know that Judge Rifkind will explain in detail Birnbaum's work with these organizations as well as

other charities with which he became associated on his own. I might add that this was the only extent of my participation in this rather unusual experience at helping rehabilitate a man whose life in the past (as you so properly assessed it) had been involved solely with making money.

In carefully reviewing the whole picture, I am convinced that he has undertaken, and is indeed accomplishing, a remarkable job. If permitted to continue with these involvements, he should prove a useful, dedicated and humanitarian servant of our society.

. . . [quoted textual matter omitted]

In summary, I would say that the defendant's activities, since he was sentenced, clearly indicate a genuine attempt on his part to rehabilitate himself along the lines suggested. You will have before you sufficient 'predictive data' to guide you in your difficult decision. I bespeak for the defendant your gifted *intuition, insight and imagination* in evaluating the redemptive qualities now no longer 'latent' but patently observable in the activities of the defendant, and I urge you to consider suspending his sentence."

4. The Second Circuit Decision Affirming the Conviction. While the above-mentioned program of rehabilitation and "probation" of Birnbaum in conjunction with the charitable and social service organizations was in progress, Birnbaum proceeded to perfect his appeal, as Judge Cooper knew he would. David W. Peck, formerly Presiding Justice of the Appellate Division of the New York State Supreme Court and formerly President of the State Bar Association, represented Birnbaum. As detailed in the Birnbaum petition (Pet. p. 11*), Mr. Peck vigorously

* References preceded by "Pet." are to pages of the Birnbaum petition to this Court. Mr. Peck charged that Judge Cooper had "turned advocate for the prosecution" and he characterized the charge to the jury as "egregiously unbalanced", "pious in expression

challenged Judge Cooper's conduct of the trial. On February 10, 1967, some 10 months after commencement of the probation-rehabilitation program, the Second Circuit affirmed Birnbaum's conviction, Chief Judge Lumbard dissenting and charging that the trial judge had, as charged by Mr. Peck, abused his power, had stepped out of his role as the trial judge and had been carried away by his advocacy and made arguments which went beyond those of the prosecution. *United States* v. *Birnbaum,* 373 F.2d 250, 265, 268-69. (2d Cir. 1964)*

5. The Proceedings to Reduce Sentence and Confirm Probation. Following the denial of certiorari, 389 U.S. 837 (1967), Birnbaum moved, pursuant to Rule 35 of the Federal Rules of Criminal Procedure, to reduce and suspend the sentence based upon his total compliance with the program charted by Judge Cooper. Despite their requests therefor, the charitable, civic and social service organizations in whose activities Birnbaum had become involved were denied the opportunity to be heard orally or to be interviewed by the probation officer of the Court. However, as previously observed, upon reargument of the Rule 35 application each of the organizations advised Judge Cooper in writing that, pursuant to the program he had initiated, they had involved Birnbaum fully and deeply in their ac-

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and pernicious in emphasis", "virulently prejudicial", "obviously improper and prejudicial", "calamitous" and "grievously wrong". Mr. Peck maintained further that Judge Cooper "took off in extemperaneous expression, gesturing and raising his voice as he did", that the charge contained "the vice of barbed implication" and that one particular aspect of the charge—when Judge Cooper gave his own "suggestion" that defendant "was up to his ears in graft and corruption"—could scarcely have been worse", "[y]et, if possible, the court made it worse . . . ."

* Even the majority was constrained to observe that "we might not have expressed ourselves or ordered our charge as did the trial judge", *supra,* 373 F.2d 250, 265.

tivities, that he had zealously pursued the tasks assigned him (and then some) and that in their view the goal sought to be achieved—rehabilitation—had been realized.

The showing thus made that Birnbaum had in fact "realigned his sights" and had "given a hunk" of himself and of his wealth "to doing with constancy those acts" prescribed by the Court was not and has never been rebutted or challenged. The Government opposed the application, however, on the ground that had Birnbaum continued to refuse to admit his guilt, emphasizing that Birnbaum's failure (as demonstrated by the appellate arguments of his counsel) to appreciate the way the judge had conducted the trial evidenced his bad character. Without explanation, Judge Cooper directed forthwith execution of the sentence, ignoring entirely the promised probation and expressly omitting to find at any time that the rehabilitation and probation process he had initiated, and Birnbaum's conduct in connection therewith, had in any way failed to meet the mark.

From that determination Birnbaum sought review in the District Court for the Southern District of New York by way of motion for a writ of error coram nobis, or in the nature of coram nobis. The charitable and social service agencies sought and were granted leave to intervene in that proceeding and to submit a petition and memorandum, *amicus curiae,* in support of Birnbaum's application. They did so not only because they are and were mindful of Birnbaum's efforts on behalf of the youth, the aged and infirm which those organizations serve and which have come to depend upon Birnbaum, but, more importantly, because they believed that the public interest was grievously affected where, as here, an injustice had been worked, to them, to a society which has been asked to accept and to aid in programs of rehabilitation of

criminal offenders, and to the integrity of the judicial process. Thus, as stated in the petition filed in the District Court by Father Jacobs, the Principal of St. Augustine's Episcopal School:

> "It is our view that Judge Cooper's determination works an injustice not only upon Birnbaum, but impunes the integrity of the Court, undermines confidence in the judicial process and does irreparable harm to the children, the aged, the underprivileged and the infirm for whom Birnbaum labored under the auspices of Judge Cooper. To illustrate, Saul I. Birnbaum merited by his deeds the designation as St. Augustine's 'Man of the Year' for 1967 and the children of St. Augustine's were so advised and they, in turn, doubtless conveyed that message to others in the Bedford-Stuyvesant community. At a time when the President of the United States, the Attorney General, the Judiciary and others cry out for respect for the law, is it not truly a tragedy for us to be compelled now to tell our children that the 'Man of the Year' of 1967 must go to jail because the Court has arbitrarily and capriciously reneged upon its promise and direction.
>
> To some it may sound trite to say that 'The true administration of justice is the firmest pillar of democracy.' To the youth, to the aged and to the infirm who have been and are being immeasurably helped by Saul Birnbaum's efforts that statement still has meaning. We seek leave to appear *amicus curiae* because it is our fundamental goal to continue to give meaning to that phrase."

On January 27, 1968, District Judge Inzer B. Wyatt denied Birnbaum's application for the issuance of a writ of error coram nobis, holding that there was "nothing that I can see that I can properly do" and that "this may be an instance to illustrate the desirability of appellate review of criminal sentences."

Birnbaum appealed from that decision. The several charitable and social service organizations sought and were granted leave by the Court of Appeals to intervene *amicus curiae*. Eight months after argument of the appeal the Court of Appeals affirmed, observing, *inter alia*:

> "The question before us for decision is not whether this court or another sentencing judge might have reacted differently to the request for modification of the sentence. Absent an abuse of discretion, Judge Cooper's determination must stand and cannot be disturbed on appeal." (A-11)

B. *The Issues Presented Meriting the Grant of Certiorari.*

From the viewpoint of the charities our grievance is not with the mere form of the sentence. Rather our complaint is directed to the propriety of the totality of circumstances of this case, commencing with the form of the sentence, then to the affirmative burden it imposed upon the defendant, then to the conditional promise it contained and, finally, to the circumstances under which that promise was dishonored. In their totality such circumstances challenge the integrity of the judicial process. Taken separately, they are both invalid and inherently unfair. Such invalidity and unfairness prejudiced not only the defendant but the charities who, by the Court's actions, became inexorably intertwined therein. By the Court's actions the charities were asked to and did become the vehicle for a Court-sanctioned program of rehabilitation —probation. They accepted Birnbaum, as they were invited to do, they involved him deeply in their activities and programs and they came to rely upon him; all the while believing that if they succeeded in affecting his rehabilitation formal probation would follow. Rehabilitation was affected, but without rhyme or reason the promise was not honored.

In searching for an explanation for what has here transpired we have looked first for some legal basis to sustain the trial court's actions and, as appears below, it is lacking. We then have looked for some equitable basis and it too is lacking. The inescapable conclusion to which we then are forced is that the totality of circumstances mandates invocation of the supervisory power of this court to secure the even-handed justice which here was lacking. *Saldana* v. *United States*, 365 U.S. 646, 647 (1961).

1. *In each of their component parts the sentence and the trial court's actions in connection therewith were invalid and in conflict with prior decisions of this Court and other Circuits.* Initially, this case raises fundamental questions respecting criminal sentence; its office, its form, its very nature, its relationship to the right of counsel adequately to represent a criminal defendant, its use to affect the inherent right of appellate review and, necessarily, the public interest in the integrity of the judicial process. In their resolution of such questions the Courts below have reached conclusions which on several separate grounds are directly at variance with prior decisions of this Court,* the Courts of other Circuits**, the Fifth and

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* See esp. *United States* v. *Behrens*, 375 U.S. 162 (1963); *Corey* v. *United States*, 375 U.S. 169 (1963). It should also be noted that this case presents the other facet of an issue as to which this Court recently granted certiorari because of the importance of the question thus presented. *North Carolina* v. *Pearce*, 397 F.2d 253 (4th Cir. 1968) *cert. granted* October 29, 1968 (No. 413, Oct. Term, 1968).

** See esp. *Patton* v. *State of North Carolina*, 381 Fed. 636 (4th Cir. 1967), *cert. denied* 390 U.S. 905 (1968); *Marano* v. *United States*, 374 F.2d 583 (1st Cir. 1967); *Thomas* v. *United States*, 368 F.2d 941 (5th Cir. 1966); *Butler* v. *District of Columbia*, 346 F.2d 798 (D.C. Cir. 1965); *United States* v. *Wiley*, 267 F.2d 453 (7th Cir. 1959) and 278 F.2d 500 (7th Cir. 1960).

Sixth Amendments to the Constitution of the United States, and the "fundamental principles of fairness" which, when violated, compel invocation of the supervisory power of this Court to assure the fair administration of justice.*

Thus premised, the effects that flowed from such sentence were equally tainted and, as hereinafter more fully appears, in conflict with numerous decisions of other Circuits. To illustrate, the sentence here imposed by its terms invited a defendant faced with imprisonment to undertake (as found by the Court of Appeals) a "calculated risk" that by embarking upon a course he otherwise had no legal obligation to pursue—a program under which, while on bail pending determination of his appeal, he would give a "hunk of himself and of his wealth" to specified charities--he might thereby, if his appeal proved unsuccessful, avoid imprisonment**; the program judicially prescribed though seemingly specific as to its terms was, as events demonstrated, to be judged by the sentencing court against such wholly subjective and undisclosed standards as to be capricious†; the vagaries of the subjective standards thus utilized permitted, if not compelled, the sentencing court to judge compliance based not merely upon the defendant's actions under the program but by the vigor with which his counsel pressed the inherent right of appellate review and the critical comments of the appellate court; and, finally, the Court enticed a number of highly reputable charitable and social service organizations to

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* See *Saldana* v. *United States, supra,* 365 U.S. 646, 647; *Yates* v. *United States,* 356 U.S. 363, 366 (1958); *Fay* v. *People of State of New York,* 332 U.S. 261, 287 (1947); *McNabb* v. *United States,* 318 U.S. 332, 341, 349 (1943).

** See *Thomas* v. *United States, supra; United States* v. *Wiley, supra.*

† See *Butler* v. *District of Columbia, supra.*

join in the charted program of rehabilitation and "probation" in the clearly proper but, nonetheless, misleading expectation that if the program were successfully undertaken it would be continued.

Manifestly, the vices of such sentencing—sentencing that is invalid both in its inception and in its resultant effects—are many, affecting the rights of defendants, the administration of justice and the public interest. Birnbaum's petition to this Court demonstrates the respects in which such sentencing adversely and improperly affects the rights of criminal defendants. Our concern is not so limited. "Our concern", in the words of Justice Frankfurter, "is with the fair administration of justice" (*Offutt* v. *United States*, 348 U.S. 11, 17 (1954)) and here the reason for concern stems from the fact that if the public is to be involved in obviously desirable programs of rehabilitation of criminal offenders* (or for that matter in any other judicially sanctioned programs) it clearly is entitled to scrupulously fair and candid treatment, particularly from the courts.

Here, such scrupulously fair treatment was lacking. As found by the Court of Appeals (A-8, esp. N. 5) the charities were led to believe and believed that the trial court had initiated a program under which the charities were to

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* As recently observed by the Advisory Committee on Sentencing And Review, "sentences which do not involve imprisonment are more likely to be effective in the vast majority of cases", as well as less expensive, and thus are to be preferred. *ABA Project on Minimum Standards for Criminal Justice, Advisory Committee on Sentencing and Review, Standards Relating to Sentencing Alternatives and Procedures*, Section 2.3(e), pp. 72-73 (1967). See also Herlands, *When and How Should a Sentencing Judge Use Probation*, 35 F.R.D. 487, 497 (1964). Public involvement in the sponsorship, and certainly in the support, of such programs of rehabilitation and probation is plainly critical, particularly if, as recommended, such programs are to be the rule rather than the exception.

supervise the rehabilitation of Birnbaum and, if such rehabilitation efforts were successful, probation rather than imprisonment would follow. That such was not a naive and untutored viewpoint is demonstrated by the fact that three experienced jurists—Justices Beldock, Heller and Bernhardt—reached the same conclusion. At no point in these proceedings has anyone, least of all the trial court, properly found that Birnbaum failed to meet the mark set for him by Judge Cooper or that he failed in any proper manner to realign his sights. If left thus misled, the charities, and we submit the public generally, will be compelled to conclude that they have been ill-used and that the integrity of the judicial promise and process is, to say the least, suspect.

(a) *The invalid nature and form of the sentence.* The Birnbaum petition to this Court sets forth in detail (Pet. 17-35) and we shall not repeat the arguments there made that tentative sentences are invalid, except where the Court expressly invokes 18 U.S.C. §4208(b) with its attendant safeguards. *United States* v. *Behrens,* 375 U.S. 162, 165 (1963); *Corey* v. *United States,* 375 U.S. 169, 173 (1963).

The Court of Appeals found that the "for the present" sentence here imposed was a tentative one, holding that under the terms of the sentence ". . . Judge Cooper unambiguously reserved the power to reassess the situation and decide whether, after Birnbaum's conviction had become final, probation would be inappropriate in light of all relevant factors, including that of appellant's behavior while his appeal was pending" (A-9). Such tentative sentence failed, however, to accord Birnbaum the option, necessarily inherent in 4208(b) sentences, to appeal either following the tentative sentence or after the entry of the final sentence. That omission not only violated the prin-

ciples enunciated in *Behrens* and *Corey*, it was the vice from which were spawned the injustices which bring us here.

By its terms the sentence compelled Birnbaum to appeal forthwith and simultaneously to embark upon the rehabilitation-probation course charted by the court. To illustrate, the trial court advised Birnbaum that it would not finalize probation until after (1) he had successfully embarked upon the charted rehabilitation program and (2) the appeal had been determined. Similarly the program was not in any way limited as to its duration, except by the action of the Court of Appeals in determining the appeal. Moreover, as found by the Court of Appeals, the trial court by its sentence gave, Birnbaum, as it gave to the charities (including the three above-mentioned jurists), the firm impression that should he appeal and should that appeal prove unavailing, he nonetheless need not face imprisonment if he pursued the specified path.

Here, then, there was imposed precisely the kind of unlawful tentative sentence—one free of any safeguards—abjured by this Court in *Behrens* and *Corey*. Thus, the defendant was placed in an untenable position in his pursuit of appellate review. If, as here, he pursued vigorously his inherent right of review, the actions of his counsel and of the appellate court would necessarily have an effect upon the trial court at the time of final sentence should the appeal fail*. Alternatively, the defendant and his counsel

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* As held by this Court in *Corey*, the option as to when to appeal from a tentative sentence under 18 U.S.C. §1408(b) finds justification in the fact that if the defendant were compelled to appeal forthwith, he "might think, rightly or wrongly, that the trial courts knowledge that an appeal had already been taken might adversely influence the court's discretion in imposing final sentence." 375 U.S. at 175.

could mute their advocacy on appeal, thereby prejudicing the appeal while preserving the "favor" of the trial court. As appears from the arguments set forth in the Birnbaum petition to this Court, which we will not repeat, such a dilemma may not properly be posed, for to do so would inhibit both the unfettered right of appellate review* and would make a mockery of the right to counsel on appeal.**

It is, of course, true that the technical arguments set forth above relate in substantial part to the validity of the sentence from the viewpoint of Birnbaum. However, in light of the predicament in which the charities have here found themselves, we feel obliged to point out these infirmities in the public interest lest they be permitted again to occur. Moreover, although the charities benefited tangibly from Birnbaum's time and efforts (and they, in turn, flowed from the sentence) such benefits pale in significance when compared with the harm that has here been done; harm to the administration of justice and the public interest. The charities (and their constituencies, vast segments of which are aware of what has here transpired) have, with reason, now come to suspect the sanctity of the judicial promise and even the integrity of the judicial process. To them sentencing is not a game and the judicial promise (even a

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* See *North Carolina* v. *Pearce*, 397 F.2d 253 (4th Cir. 1968) *cert. granted* Oct. 29, 1968 (No. 413, Oct. Term 1968); *Patton* v. *North Carolina*, 381 F.2d 636 (4th Cir. 1967); *Morano* v. *United States*, 374 F.2d 583 (1st Cir. 1967). Those cases, including *Pearce* which now is before this Court, hold that the right of appellate review shall not be hampered by the possibility that a *successful* appeal may result in an increased sentence on remand. This case, of course, poses the same question in respect of an *unsuccessful* appeal.

** See *Douglas* v. *California*, 372 U.S. 353 (1963). Obviously, the right to counsel on appeal is meaningless if such counsel is to be shackled in his advocacy by being barred from vigorously asserting any claim, however helpful to his client, that *may* displease the trial judge.

conditional one) is not to be viewed as a "calculated risk" with the prospect that it will be measured by the morals of the marketplace—perhaps honored, perhaps not. Hence our deep concern with what has here transpired, in all of its aspects, and our comment thereon as *amicus curiae.*

(b) *The resultant effects of such sentence.* It is, perhaps, not surprising that with an invalid sentence as the predicate, the events that followed were equally tainted.

First, at a time when Birnbaum would have been free to pursue whatever course he chose, while on bail pending appeal (Fed. Rules of Crim. Proc., Rules 38(b), 46), that freedom here became the subject of restraint. Birnbaum was, in the words of the Court of Appeals, offered a "faint glimmer of hope" that by undertaking a "calculated risk" he might "persuade the sentencing judge that he should not suffer confinement." (A-9, 10). Even if viewed in the light thus suggested by the Court of Appeals, the fact remains that Birnbaum had no choice, bearing in mind "[t]he unequal position of the judge and the accused, one with the power to commit to prison and the other determined to avoid prison . . ." *United States* v. *Gilligan,* 256 F.Supp. 244, 254 (S.D.N.Y. 1966). See *Worcester* v. *Commissioner of Internal Revenue,* 370 F.2d 713, 718 (1st Cir. 1966). Thus viewed, Birnbaum was enticed to embark upon a program under which, by the giving of a "hunk of himself and of his wealth" to charity, he might in the eyes of the Court then be entitled to probation. However, if thus viewed, the decisions below conflict with the holdings of other Circuits that the discretionary sentencing power of the trial court, howsoever sought to be justified, may not be used as a way to pressure a defendant to follow a certain course of action by punishing him with a more severe sentence if he does not. *Thomas* v. *United States,* 368 F.2d 941 (5th Cir. 1966);

United States v. *Wiley,* 278 F.2d 500 (7th Cir. 1960). Here that course of action was a program under which defendant would give a "hunk of himself and of his wealth" to specified charities and the alternative would be the trial court's refusal to consider the availability of probation, even though it had already found the defendant a fit subject for such rehabilitation. Additionally, the decisions below if thus viewed conflict with the holding of the Seventh Circuit that such pre-conditions upon judicial consideration of the availability of probation are invalid. *United States* v. *Wiley,* 267 F.2d 453 (7th Cir. 1959).

The prejudice incurred by Birnbaum by reason of a sentence that was invalid in inception and in pursuing the course there charted by the trial court could only be justified (if at all justifiable) upon either of two grounds. First, as we suggested below, the circumstances taken as a whole might be viewed as probation, for indeed there were here present, insofar as Birnbaum and the charities were concerned, all of the indicia of probation.* Second, it might be viewed as a conditional prom-

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* In the proceedings below we urged that, in practical effect, Birnbaum had been placed on probation at the time of and by virtue of the sentence. That view, as found by the Court of Appeals, was the one the charities (and the experienced jurists who acted for them) had held from the outset of the program. The Probation Act is, of course, a remedial statute and must be liberally construed. *E.g.: Scalia* v. *United States,* 62 F.2d 220, 223 (1st Cir. 1932); *Reeves* v. *United States,* 35 F.2d 323, 325 (8th Cir. 1929); *Nix* v. *James,* 7 F.2d 590, 592 (9th Cir. 1925). Liberal construction of the Probation Act permits the status of probation to exist under the Act even though the technical requirements of the Act have not been met. *E.g.: McHugh* v. *United States,* 230 F.2d 252 (1st Cir. 1956), *cert. denied* 351 U.S. 966-76; *Campbell* v. *Alderhold,* 36 F.2d 366 (N.D. Ga., 1929). Although all of the technicalities of the Act have not here been met, the statements made by the Court at sentencing and thereafter amounted to an invocation of the Act. Thus, in every practical respect, the relationship of the Court to Birnbaum since sentencing met or surpassed the qualifications of proba-

ise on the part of the Court that if Birnbaum successfully pursued the path of rehabilitation he would be placed on

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tion as established by the Act. First, the Court approved a particular course of action for Birnbaum to follow and led him to believe that if he followed that course he would not be required to go to prison to serve out his sentence. Second, the Court used the power given it by the Act to force Birnbaum to adopt a stated course of conduct; by emphasizing its power to send Birnbaum to prison on the one hand or, to give him liberty on the other, the Court was able to dictate Birnbaum's conduct for upwards of eighteen months. Third, Birnbaum was under the same pressures and restrictions that he would have been under had an official probation order issued; there was no doubt that the simple choice was to follow the charted course or face the prospect of imprisonment. Fourth, Birnbaum's activities were supervised by an officer of the judicial system (albeit a judge rather than a court probation officer) who in turn maintained contact with the defendant and the sentencing court, and, in addition, by seven responsible public agencies (two of whom supervised Birnbaum's activities through the eyes of judges who also were, to say the least, experienced and expert). Fifth, the conditions imposed on Birnbaum were not only affirmative, but of immense proportions. Certainly such conditions exceeded the norm (e.g., refrain from further violations of law, work regularly, behave); they called for specific conduct in terms of time, effort and monetary expenditures. The only missing ingredient for formal probation thus was a formal court order. However, as *McHugh* and *Campbell* make clear, such an order is not indispensable, it can be provided *nunc pro tunc*. See also *United States* v. *Mulligan*, 48 F.2d 93, 94 (2d Cir. 1931); *Buhler* v. *Pescor*, 63 F. Supp. 632, 638 (W.D. Mo. 1945); *Archer* v. *Snook* (N.D. Ga. 1926). *Cf.*, *United States* v. *Morse*, 344 F.2d 27, 29 n. 1 (4th Cir. 1965).

A fortiori, if probation was in effect it could not be revoked under the Act absent a clear showing that the conditions prescribed had been violated. *Hollandsworth* v. *United States*, 34 F.2d 423, 428 (4th Cir. 1929). See also *Broadus* v. *United States*, 317 F.2d 212, 213 (5th Cir. 1963); *Yates* v. *United States*, 308 F.2d 737, 739 (10th Cir. 1962). Here no one has contended, nor could they, that any such violation occurred. Of course, probation is in itself a form of punishment. *E.g.: Toyosaburo Korematsu* v. *United States*, 319 U.S. 432, 434-35, 63 S. Ct. 1124, 87 L. Ed. 1497, 1498-99 (1943). Neither the charities nor even Birnbaum urge that he escape punishment. Rather, they here seek, as they sought below, that the punishment fixed be that specified at sentencing—probation.

probation should his appeal fail.* Howsoever viewed, the indisputable fact remains (as found by the Court of Appeals) that the trial court knowingly permitted (if not encouraged) the charities to embark with Birnbaum upon the program of rehabilitation and the charities were led to believe and believed that, if that program were successful in terms of rehabilitating Birnbaum, probation would either be finalized or formalized. Again, those were not merely the judgments of persons unskilled in the law; included were the judgments of three experienced jurists based upon the statements made by the trial court at the time of and following sentencing.

Second, having thus initiated a program of rehabilitation (whether one of probation or one intended to satisfy conditionally promised probation) even-handed justice dic-

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* Any other construction would place the trial court in an unthinkable posture. Thus, it could not fairly be suggested that the course outlined at sentencing was a judicially meaningless one, except that it might be "good for Birnbaum's soul". Such an approach would violate the proscription of Canon 21 of the Canons of Judicial Ethics, that: " . . . Though vested with discretion in the imposition of mild or severe sentencing he [, the Judge,] should not compel persons brought before him to submit to some humiliating act or discipline of his own devising, without authority of law, because he thinks it will have a beneficial corrective influence". *Cf. Weems* v. *United States,* 217 U.S. 349 (1909). Neither can it be suggested that the course outlined amounted, at best, to a "faint glimmer of hope", a "calculated risk" on the part of Birnbaum that, following determination of the appeal, Judge Cooper, who (in the words of the Court of Appeals) had "unambiguously reserved the power to reassess the situation", might or might not in imposing final sentence then grant probation. All of the evils of tentative sentencing would then be magnified. The trial court would thereby be imposing an unwarranted and inappropriate condition upon the grant of probation. *United States* v. *Wiley,* 267 F.2d 453, 455 (7th Cir. 1959). *Cf. Due Process in Sentencing,* 81 Harvard Law Rev. 821, 843 (1968). Moreover, if thus viewed, the trial court would have been engaging in the same kind of subjective sentencing as was found to be without basis in law in *Butler* v. *District of Columbia,* 346 F.2d 798 (D.C. Cir. 1965).

tated that the trial court either grant probation upon completion of the program or clearly state a proper basis for not doing so. Neither event here occurred.

The record discloses that in decreeing imprisonment rather than probation (both on the original application for the reduction of sentence and upon reargument) Judge Cooper denied the application of the charities to be heard orally, that they were never interviewed or in any way contacted by the court's probation officer and that Birnbaum, himself, was denied the opportunity for allocution. Nonetheless, the record is clear (and undisputed) that Birnbaum's rehabilitation was a success in precisely the terms specified by the court and that he had realigned his sights. The record also discloses that the government, although opposing probation and arguing for imprisonment, never challenged the merits or success of the rehabilitation program; rather it confined itself to the fact that the arguments of Birnbaum's counsel upon appeal evidenced Birnbaum's bad character and his unappreciativeness of the opportunity afforded him by the Court. No finding was at any time made by Judge Cooper that Birnbaum had failed to meet the mark set for him, or the respects in which he had thus failed. Judge Cooper simply held that, after due deliberation, he felt that Birnbaum should be imprisoned.

In light of the circumstance of this case, such action is, we submit, a denial of due process (*Due Process in Sentencing, supra,* 81 *Harvard Law Rev.* at 845) or, at least, a violation of the standards for the fair administration of justice sufficient to call for the invocation of the supervisory power of this Court. Manifestly, unless the defendant understands the nature of and reasons for the sentence which he is about to serve it has little useful impact upon him and

consequently leads only to cynicism. *ABA Project on Minimum Standards for Criminal Justice, Sentencing Alternatives and Procedures, supra* at pp. 270-272; *Due Process in Sentencing, supra,* 81 *Harvard Law Rev.* at 843-44. Furthermore, where as here, the public has been invited to join the Court in the sponsorship of a program of rehabilitation, it is, at the very least, entitled to the scrupulously fair treatment and candor of such findings.*

As stated in the reports which the charities gave to Justice Heller and which he transmitted to Judge Cooper and as stated in the writings from the charities to Judge Cooper, it was and is the unanimous view of the charities that Birnbaum met the mark set for him (and then some), that he realigned his sights and that the rehabilitation program was a complete success. No one has ever disputed that showing, because they could not do so. *A fortiori* Judge Cooper's actions must have been based upon some event or consideration other than that which he outlined in his sentence and which served as the basis for the charities undertaking the role they did. If that undisclosed event or subjective consideration related to the circumstances

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* Indeed, that such lack of findings is not merely a disservice to the criminal defendant and to the public generally, but is also a distinct disservice to the judicial system is readily illustrated here. In the proceedings, arguments and decisions below, counsel and the courts were compelled to engage in conjecture in an effort to explain the actions of the trial court. Thus, the Court of Appeals was compelled to speculate that, although "Birnbaum may indeed have devoted much time and effort and have contributed large sums to charities", "[i]t *appeared* that in the judge's eyes appellant did not make 'the impressively convincing showing' that the Judge felt was necessary before he could grant probation" and that "the Judge did not *seem to feel* that the best interest of the public would be served by granting appellant probation". (A. 9, 10). Manifestly a record which compels resort to such conjecture is not merely inappropriate, it offends "civilized standards of procedure". *Cf. McNabb* v. *United States,* 318 U.S. 332, 340 (1943).

surrounding Birnbaum's appeal, then, as more fully appears from Birnbaum's petition to this Court, it is a patently improper consideration. If that subjective consideration transcended the normal and proper bounds of rehabilitation (which normal and proper bounds here were met), then, like all such wholly subjective standards, it is without basis in law. *Butler* v. *District of Columbia,* 346 F.2d 798 (D.C. Cir. 1965). Whatever undisclosed consideration may here have influenced the trial court's actions, the fact remains that those entrusted with the administration of that charted program unanimously viewed it to have been successfully complied with and no contrary showing has ever been made.

2. *Viewed as a whole, the sentence and the events flowing therefrom were not merely violative of provisions of law, they violated elementary principles of even-handed justice.* In the foregoing discussion we have focused briefly on particular aspects of the sentence which, to our mind at least, raise serious questions as to the essential validity of the sentence and the events it set into motion. However, as we previously observed our concern is not with the form of the sentence; it is instead with the totality of the circumstances of this case. As we view it, albeit in retrospect, the circumstances of sentencing were legally tainted from start to finish. What emerges, nonetheless, is that a distinct promise was here conveyed not merely to Birnbaum, but to those who by the trial court's actions were invited to lend themselves to aid in affecting the court's stated desire to secure the rehabilitation of Birnbaum. It is, in the final analysis, that notion of judicial commitment to formally place Birnbaum on probation (if what the court asked be done was in fact done) that we seek here to have honored.

Under circumstances such as here obtained the public, if not Birnbaum, is plainly entitled to enforce the sanctity of the judicial promise and the inviolate nature of elemental standards of judicial fairness. See e.g. *Machibroda* v. *United States,* 368 U.S. 487, 82 S.Ct. 510, 7 L.Ed. 2d 483 (1962); *Shelton* v. *United States,* 356 U.S. 26, 78 S. Ct. 563, 2 L.Ed. 2d 579 (1958); *Walker* v. *Johnston,* 312 U.S. 275, 61 S.Ct. 574, 85 L. Ed. 830 (1940); *United States* v. *Taylor,* 303 F.2d 165 (5th Cir. 1962); *People* v. *Price,* 24 Ill. App. 2d 364, 164 N.E. 2d 528 (Ill. App. 1960); *Weber* v. *State,* 58 Ohio St. 616, 51 N.E. 116 (Ohio Sup. Ct. 1898).* As stated by the Supreme Court of Utah:

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* The Court of Appeals rejected the concept of conditional promise upon two grounds. First, it concluded that "[a] careful reading of Judge Cooper's statement, however, reveals no conditional promise that appellant's imprisonment sentence would be suspended but only a suggestion that probation remained a feasible possibility". That position is untenable for the reasons previously stated, and for the further reason that the Court's subsequent conduct in twice giving its imprimatur of approval to the specific program embarked upon by Birnbaum and the charities demonstrated that more than a mere exercise was here intended. It also is untenable because, though the word "might" was repeatedly used, that word, in context, could have no proper meaning other than that probation would follow *if* Birnbaum pursued the charted path. Clearly that was the meaning ascribed to it by the charities and the experienced jurists acting for them. It would be a whimsical and thus an invalid sentence (*Butler* v. *District of Columbia, supra*) if it were to be construed, as suggested by the Court of Appeals, as meaning that the trial court "might" or that it just "might not" grant probation, irrespective of what Birnbaum did. Moreover, any construction other than that of conditional promise would raise the question as to whether the trial court acted lawfully in enticing Birnbaum to expend the time and effort he did during a period when he was to be free of restraint pending appeal. Use of the discretionary sentencing power of the trial court, as a way to pressure a defendant to follow a certain course of action by punishing him with a more severe sentence if he does not, has been condemned as an abuse of the trial court judge's discretion. *Thomas* v. *United States,* 368 F.2d 941 (5th Cir., 1966); *United States* v. *Wiley,* 278 F.2d 500 (7th Cir., 1960). Here, however, a

> "If those who are to be reformed cannot implicitly rely on promises or orders contained in the suspension of sentences then we may well expect the law to fail in its purpose. Reformation can certainly best be accomplished by fair, consistent, and straightforward treatment of the person sought to be reformed." *State* v. *Zolantakis,* 70 Utah 296, 259 p. 1044, 1046, 54 ALR 1463 (1927).

Where, as here, the public is enlisted to aid in a judicially sanctioned program it is similarly entitled to such "fair, consistent, and straightforward treatment". Moreover, that the sanctity of judicial promise is to be given the widest possible latitude and, indeed, that the defendant need not even be the one directly benefited by the promise is now clear. *Hassell* v. *United States,* 287 F.2d 646 (9th Cir. 1961). Here not only Birnbaum but the charities unquestionably believed that a promise had been made to them; the charities welcomed the opportunity to be of aid to the Court and to avail themselves of Birnbaum's assistance; they invited Birnbaum to become immersed in their programs and problems and, pleased by his effective help, they

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way, apparently, was sought to be found (through use of the conditional term "might") to avoid that problem.

Second, the Court of Appeals found that an enforceable conditional promise was not stated because " . . . Birnbaum did not lose any basic rights by following the advice of Judge Cooper". As previously observed, that view is untenable for various reasons, if only the fact that by following the advice Birnbaum gave up the basic right to remain free of restraint pending appeal and, in addition, gave time, effort and money to entities and under circumstances not of his own choosing. Moreover, as viewed by the charities such an argument is disengenuous. Certainly, the charities benefited tangibly from Birnbaum's efforts; but their respect (and that of the many they serve) for the integrity of the judicial process, their regard for the sanctity of the judicial promise and their willingness again to be thus used is the true standard of measurement, and against that standard the administration of justice and the public interest paid a shocking price. To them and to society, at least, the fair administration of justice must mean something more than a "calculated risk" that right "might" be done.

permitted many of their future programs to be planned in reliance upon his continued participation therein as the Court had led them to believe would be the case. Elementary principles of justice and fairness mandate that the reliance thus placed in the honor of the Court be now enforced by this Court in the exercise of its supervisory power.

C. *The Remedy.*

It is now well settled that this Court has such supervisory control of the District Courts as is necessary to the administration of criminal justice in the federal courts. *E.g.: Saldana* v. *United States, supra; Yates* v. *United States,* 356 U. S. 363, 366 (1958); *Fay* v. *People of State of New York,* 332 U. S. 261, 287 (1947); *McNabb* v. *United States,* 318 U. S. 332, 340, 341 (1943).

It is equally well settled that, as to the scope of such power, "[t]he sole common denominator of its usage is a desire to maintain and develop standards of fair play in the federal courts more exacting than the minimum constitutional requirements of due process." *The Judge-Made Supervisory Power of the Federal Courts,* 53 Geo. L. J. 1050 (1965). Stated otherwise, but to the same effect, "[s]o long as the 'error' violates the Court's standards for conducting judicial proceedings, reversal will usually follow even though the effect on the particular litigant may have been inconsequential or non-existent. Where there was prejudice to the litigant, he is relieved of the need to demonstrate it; where there was none, he becomes the beneficiary of a gratuitous reversal of an unfavorable verdict [or decision] because the judicial proceeding happened to be improperly conducted." *The Supervisory Power of the Federal Courts,* 76 Harv. L. Rev. 1656, 1657 (1963).

With the "fair administration of justice",* "fastidious regard for the honor of the administration of justice"** and the maintenance of "civilized standards of procedure"† as the sole standards for invocation of the power, this Court has unhesitatingly exercised that power whenever elementary considerations of fairness seemed to call for its invocation.

Thus, in *Thiel* v. *Southern Pac. Co.*, 328 U. S. 217 (1946), the power was invoked to reverse the trial court where the sole vice was the method of jury selection and wholly without regard to whether petitioner was in any way prejudiced thereby. In *Offutt* v. *United States, supra,* this Court held that where the trial judge had engaged in partisan or otherwise unbecoming judicial behavior, supervisory power should be invoked to order a new trial before another judge, Justice Frankfurter stating: "The question with which are concerned is not the reprehensibility of petitioner's conduct and the consequences he should suffer. Our concern is with the fair administration of justice." 348 U. S. at 17.

Supervisory power to assure even-handed justice was invoked by this Court in *Saldana* v. *United States, supra,* under somewhat similar circumstances to those here present—i.e. where a promise was at least implicitly made††

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* *Offutt* v. *United States,* 348 U. S. 11, 17 (1954).

** *Communist Party* v. *Subversive Activities Control Bd.,* 351 U. S. 115, 124 (1956).

† *McNabb* v. *United States,* supra 318 U. S. 332, 340.

†† Significantly, the trial judge did not there unequivocally promise the lesser sentence but merely inquired of counsel for defendant: "Would you like to have me make it five years on each Count and to run concurrently and waive time right now?" That such statement did not constitute an unequivocal promise is also demonstrated by the fact that the trial judge, at the government's request, deferred imposition of sentence until after the co-defen-

of a lesser sentence, only to be dishonored thereafter. There, defendant pleaded guilty to two counts of a five count narcotics indictment. At sentencing, the trial court stated that it would impose a five year sentence. However, upon the Government's objection to the imposition of sentence at that time (since a co-defendant was scheduled to stand trial within a few days), the trial court withheld sentencing, but reassured defendant that the Court would keep its word and impose the five year sentence. The trial of the co-defendant did not proceed and another judge was assigned to impose the sentence. Upon hearing about the earlier proceedings, the second judge decided not to accept the guilty plea because, in his judgment, it smacked of plea bargaining and indicated that he would not consider himself bound by the first judge's statement. Counsel for defendant requested that the case be re-assigned to the first judge and that application was denied. Thereupon, the defendant stood trial and was convicted and sentenced by the second judge to twenty years. The Ninth Circuit affirmed. This Court granted certiorari and set aside the sentence holding:

> "During oral argument in this Court the Solicitor General suggested that the combination of circumstances in this case, beginning with one judge's clearly expressed intention to impose a five-year sentence, and ending with another judge's imposition of a twenty-year sentence under the indictment, was not consistent with that regularity and fairness which should characterize the administration of criminal justice in the federal courts. In light of the Solicitor General's sug-

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dant had been tried, thereby, arguably reserving to himself the right then to re-assess the situation. Thus viewed, the circumstances of *Saldana* are strikingly similar to those of this case as viewed by the Courts below.

> gestion, and upon an independent examination of the record, we have concluded that a due regard for the fair administration of justice requires that the convictions under counts 3, 4, and 5 of the indictment be set aside." 365 U.S. at 647.

The circumstances of this case compel invocation of this Court's supervisory power. Here a tentative and invalid sentence was imposed and from that vice there were spawned practices which were equally invalid and offensive, not merely to the defendant, but to the administration of justice and to the public at large. Whatever else may be said, the trial court dangled before Birnbaum (and others) the promise, if not the fact, of probation to persuade Birnbaum (and others) to follow a desired path; Birnbaum (and others) followed that path with the knowledge and acquiescence of the trial court; the promise then was affirmed and reaffirmed by the trial court; and the trial court then whimsically ignored its promise without affording the third parties—the charitable and social service organizations—which it had involved in this program an opportunity to be heard and without ever determining that Birnbaum had in any way, shape or form failed to meet his obligation. It cannot seriously be contended that such conduct is consistent with the fair administration of justice, that it honors the administration of justice, that it is consistent with the maintenance of civilized standards of procedure and that it will enhance respect for the law. Without more, invocation of the Court's supervisory power to reverse the order of commitment and to formalize the probation is mandated. In that regard we should, again observe that such a direction would not permit the defendant to escape punishment. Probation is in itself a form of punishment, particularly where, as here, it calls for

the defendant to perform affirmative acts to demonstrate his continued good conduct and to affect his rehabilitation. E.g. *Toyosaburo Korematsu* v. *United States, supra,* 319 U.S. 423, 434-35. Hence our plea for a direction that the punishment here to be imposed be that which was committed by the trial court at sentencing and which the trial court then expressly indicated, under the circumstances of this case, was the appropriate punishment for this defendant, namely *probation.*

CONCLUSION

FOR EACH OF THE FOREGOING REASONS, IT IS RESPECTFULLY URGED THAT FUNDAMENTAL FAIRNESS, THE INTEGRITY OF THE JUDICIAL SYSTEM AND EVEN-HANDED JUSTICE DICTATE THAT A WRIT OF CERTIORARI ISSUE TO REVIEW THE DECISION OF THE SECOND CIRCUIT AND THAT PETITIONER BIRNBAUM'S PROBATION SHOULD UPON REVIEW BE FORMALIZED.

December 11, 1968.

Respectfully submitted,

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APPENDICES

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APPENDIX A

[Letter dated December 22, 1967 from Dr. Sidney Marks, Executive Director, United Cerebral Palsy Association of Nassau County, to Judge Irving Ben Cooper]:

"Dear Judge Cooper:

I take the liberty of writing to you to express my deep concern for Saul Birnbaum.

I have just learned that your Honor has denied Mr. Birnbaum's application to suspend the service of his sentence. I feel that those of us with whom Mr. Birnbaum has worked during the past year and a half have somewhat been remiss in adequately apprizing your Honor of the nature of Mr. Birnbaum's endeavors in our behalf and the character of the man himself as I have come to understand him.

I am fully aware that Mr. Birnbaum has been convicted of a crime. However, I very strongly feel that his confinement in prison would severely retard his personal rehabilitation and result in serious loss to those of us intimately involved in the rehabilitation of the thousands of young human beings who need our help.

We in Cerebral Palsy deal with rehabilitation—with trying to equip and prepare the handicapped for at least limited usefulness to themselves and society. Because we believe in the concept that to make life meaningful is as important as—indeed in many instances more important than—life itself, we dedicate ourselves to the backbreak and the heartbreak of our work to salvage the body, train the mind, and bolster the spirit of the multi-handicapped.

Saul Birnbaum for more than a year has deeply involved himself in our efforts in behalf of cerebral palsied children and adults. Your admonition to Mr. Birnbaum—opening, as it did, new and to him unknown vistas of communal service—initiated a program of rehabilitation for Mr. Birnbaum so effective, imaginative and novel that it has commanded the respect and enthusiastic endorsement of those of us who have come to know of it.

It is my sincere belief that the whole of the story of Mr. Birnbaum's communal efforts have not been told to your Honor. I, for instance, know that no one has ever approached me nor anyone at the Center, to learn from us those facts which I am sure your Honor would want to know about Saul Birnbaum's endeavors during the past year or more; the knowledge of which facts I am sure your Honor would consider important in the making of a determination.

You have provided living proof, Sir, that there are no obstacles which cannot be overcome to restore a person as a resource to the community. I most respectfully urge you to reconsider your most recent decision [and] to permit the continuation of Mr. Birnbaum's rehabilitation process, to his and the community's immeasurable benefit. I ask your Honor to consider what Saul Birnbaum has already done and can do, for us.

No consideration of the effectiveness and the wisdom of your Honor's prescription for rehabilitation can be complete unless it includes our experience with Mr. Birnbaum at Cerebral Palsy. With his guidance, through his foresight, imagination, and because of his deep concern with our problem, we are moving toward our goal when the handicapped and their families will have been relieved of one of the greatest sources of their anguish.

When Saul Birnbaum first came to our center, he met many of the parents whose daily lives are affected

by the pain and the suffering of their cerebral palsied children. Birnbaum spoke to these parents, and quickly recognized that the heaviness of their hearts and their day-to-day anguish, however, terrible, was less than their overwhelming concern for the future of their handicapped children. Somehow, they felt they could cope with the present, and so long as they lived, somehow provide for the care of their youngsters. But they are overwhelmed by the contemplation of the future. Too often we hear the heartbreaking question, 'What will happen to our children when we are gone? Who will take care of them?' The brutal fact is, Judge Cooper, that nowhere is there a full-time residential care facility for the cerebral palsied.

Saul immediately suggested, fully committed, and pledged himself to the establishment of a full-time residential and treatment center for palsied orphans. At once he set in motion the machinery to plan and build the necessary residential center for these tragedy-stricken people. He has devoted countless hours to this task. The program embraces a new center that will provide for the social, medical and rehabilitative needs of the palsied. So diligent has his work on this experimental program been, that we are already close to the start of construction.

We sincerely believe that this center will be a model for the entire country. For the first time, the multi-handicapped will face the future without fear of total abandonment.

In addition to the residential center, Saul has devoted considerable time to the expansion of our medical wing. Our Medical Center is a key portion of our facilities. We are planning a major expansion of this medical wing, with provisions for added staff and patients.

Despite the many problems and tensions of this past year, we have made significant advance in the area of

attaining financial security. Much of this progress has been a result of Saul Birnbaum's direct efforts. His studies of the problem and his recommendations have proven invaluable. The demands upon Saul's time have been great; there have been frustrating and innumerable committee meetings, phone calls and conferences, which only a charity can command and the charitably-inclined can provide. Saul Birnbaum has given unstintingly of himself in this endcavor. He assumed the chairmanship of our Journal, which has just come to a successful conclusion. The funds raised through his efforts are making it more possible for us to do our job at Cerebral Palsy.

I am sure that when your Honor reviews Birnbaum's massive effort in our behalf—the establishment of the residential center, expansion of our Medical Wing, creation of a program for endowment funds, and his contribution of time and money to help solve our financial problems, you will agree with me that Mr. Birnbaum is a man not only of ability, but of true compassion and dedication.

It would be impossible for me to recount all that Saul Birnbaum has meant to us. The road, of our cerebral palsied and their families, is a long and hard one to travel, but the goal makes the difficult journey worth while. I most sincerely ask that you help us by exercising your judicial power with compassion, and permit Saul Birnbaum to *continue* his good work with us." (Emphasis supplied).

APPENDIX B

[Letter, dated December 21, 1967, by Father W. G. Henson Jacobs, Principal of St. Augustine's Episcopal School, to Judge Irving Ben Cooper]

"Dear Judge Cooper:

It is with a heavy heart that I write to you in behalf of our very dear friend, inspirational leader and director—Saul Birnbaum. I write to you as Principal of St. Augustine's and the Past President of the Protestant Council of Brooklyn.

Our school—located in Bedford Stuyvesant—is now offering quality education for hundreds of Negro children. From the depths of poverty, from the brink of hopelessness, many of these youngsters have been encouraged to pursue their education and rise to fine careers and lives.

Children with ability are given the opportunity to learn, which they never would except for this school. They are given the chance that frequently they never would have.

To these ends, St. Augustine's has dedicated itself. We are recognized as an excellent school, doing a very significant job in a community that truly needs help of this type.

Against this setting and during a period of very great stress at our school, we met Saul Birnbaum. It was approximately a year and one half ago, when Saul visited our school—then located in the YMCA at 55 Hanson Place. He exhibited an unusual awareness of the social and educational problems that confronted youngsters from our environment.

That first day, he visited with virtually every teacher in our school. He spent a number of hours in the classrooms. He chatted with our students, young and old.

He asked them about their reading their interests and their studies. At the outset, I was greatly impressed with his desire to probe—to understand—and to assist us.

At the end of his visit, Saul said, "I want to be of help. What can I do?"

With this offer—a new chapter began in the history of our school. Judge Cooper, you must know of the events that have transpired, because only then can you evaluate the tremendous time, energy and guidance that Saul has given and may continue to give to us. He is a charitable man. But beyond mere charity, he is a socially conscious man who is giving without stinting of his time and energy.

Our foremost problem at that time—as it is today—was to plan a permanent home for our school. When we were founded, we were located in our church building at Marcy and Lafayette Avenues. As the community learned of our work, the demands for entrance grew so rapidly, that we were forced to take temporary quarters at the YMCA. Here, too, the size of our student body has continued to grow.

Saul saw our church quarters and the YMCA facilities. And he advised us that the 'Y' quarters—while excellent in terms of mass transportation—were poorly laid out, difficult to supervise and not suitable for expansion.

He set forth a plan, by which we would start to scour our neighborhood for a suitable building of our own. It was evident to us that his background as a realtor and financier would be of immense value to us and our children.

The problem became still more acute a few months later when we were notified that the State of New York was acquiring the YMCA building for use as a narcotics rehabilitation center.

We held a number of emergency meetings with Saul. He advised us to seek permission to complete the

school term at the YMCA without interruption. He then created a "team" of professionals—architect, attorney and himself—that joined with a group of parents and teachers from the school, to hasten our search and evaluation concerning the new building.

A number of potential sites were considered. Saul visited each and every one of them with me. At first we found a catering hall that appeared suitable. But the renovations and mortgage charges appeared far beyond the scope of our income. We visited abandoned commercial buildings and a theatre that was placed on the market.

Saul spent days—literally days—in driving through Bedford-Stuyvesant with me. He was quick to spot massive defects in the buildings that we contemplated, many of which I could not see. Yet he did not permit us to panic. The YMCA situation ended and we moved to temporary quarters once again. Despite this, our enrollment was high. The educational environment in this space is poor, but through Saul's encouragement, we notified the parents and the children alike that this would be a stop-gap situation—that we would soon have our own facilities.

Several weeks ago, we located a large building that is being used by the Arion Club on Bushwick Avenue in Brooklyn. Saul visited the building a number of times. Once with an architect, who has prepared plans for a complete modernization of the structure. (Parenthetically—this was the second full set of plans that Saul had prepared. A prior set was devised for another building, which proved to lack many of the ingredients we required).

The following week, Saul took a builder to the structure—impressed upon him that this was a vital job for the school—and had this builder provide us with a rough cost analysis and opinion concerning the building.

Saul also met with our parents' group, and outlined a course of procedure for us to follow in acquiring the property, and erecting an appropriate structure thereon.

Negotiations are presently under way. With Saul's active guidance and participation, we hope to bring this project to a successful conclusion in the near future.

We will have a building that is well located and suitable for the purpose of our school. It has a large gymnasium-auditorium; sufficient rooms for classrooms to accommodate 400 students; good kitchen and other facilities. We plan to establish a pre-school nursery class too.

Without a doubt, if Saul Birnbaum had not been helping us during these trying times, we would not be at the point where our future seems secure. He has been a tower of strength and has used his time unsparingly in our behalf.

But let me discuss other aspects, too, of his work. At the very beginning of our relationship, he asked if there were any very needy, yet extremely talented children at our school—children who really required financial aid to continue. He met with a number of them and established an annual scholarship. The Amsterdam News singled out this award for attention.

Saul also exerted efforts to try to create a school dropout program, under which we would take in a number of school dropouts for special educational training. At the same time, they would be assisted by us in getting part time jobs, so that they would work and study at the same time. He put us in contact with a number of people and we are in the process of seeking to develop this program with the help of Federal Poverty funds.

Saul helped us with our camp. As you may know, we operate a summer camp for poverty children. These are youngsters who have never seen the beauty of the countryside green. We give them a summer of fun at

our own camp. Saul met with the camp committee a number of times. He is currently outlining a program by which we will expand our service by contacting other camping groups in an effort to have them take additional children from our school at their camps. We cannot devote full time to the camping program, and Saul thinks we may be able to interest other groups devoted exclusively to camping operations, to help us increase the numbers of youngsters that receive summer vacations without charge.

Our Board of Directors was so impressed with Saul's efforts that we voted him our "Man of the Year". This award was presented to him at our graduation ceremonies this past June. At that time, Saul presented medals to the outstanding students and delivered a very touching speech to our children. *His name and his activities serve as symbols of promise to our students, teachers and parents.*

Saul also arranged for the Brooklyn Philharmonia to provide hundreds of free tickets to our children for their children's concert series. You would have been thrilled to see the looks of joy and excitement on the faces of our children.

The list is endless. Any charitable organization that can have the unusual talents of a Saul Birnbaum to help it, has a vast reservoir of strength.

We feel that your honor would want to know this. *We wanted you to know that we are distraught over the decision and are praying that he may be spared to continue his work. We are so desperately in need of his advice and assistance. If we do not now conclude the transaction for our new building, we will forever lose the opportunity. We rely so heavily upon Saul.*

If you send him to prison, our school plans will collapse. Our fond hope of many years will again become a frustrating hope instead of reality.

We pray that through this letter you will come to understand his role with us.

I implore you to meet with me. I would be pleased to discuss this situation with you at very great length. Our entire community has a very real and heartfelt concern for our friend, Saul Birnbaum.

With humility and with hope, I remain,

Very truly yours,

The Rev. W. G. Henson Jacobs"
(Emphasis supplied)

APPENDIX C

[Letter, dated December 22, 1967, from Rabbi Morris Schmidman, Dean of Hillel School of the Shore Area, to Judge Irving Ben Cooper]

"Dear Judge Cooper:

I fervently pray that you will give your compassionate consideration to this must heartfelt plea on behalf of Saul Birnbaum.

When you recommended that he apply himself to works of charity, you bestowed upon our school a unique blessing. The insight that you so graciously made manifest by this directive was a noble expression of our prophetic tradition of righteousness, charity and compassion.

Has he failed to heed your admonition? Was his work for our school too begrudging? Did he not make the efforts and sacrifices which would vindicate him in your blessed judgment?

Your Honor, I beg you to consider the faithfulness with which your suggestion has been followed and the eternal good that has resulted from it. The Hillel School, founded seventeen years ago, is an educational institution dedicated to our American culture and Jewish heritage. I am the Dean of the School and am responsible for its day-to-day functions and administration. I know intimately that were it not for the dedicated help of Saul Birnbaum in this past year, the existence of this school would have been in serious jeopardy.

Our school is not large, except in spirit. We have a vision of youngsters growing to manhood as fine citizens with religious convictions. They will be good men and women, good fathers and mothers, good neighbors and citizens. We have not completed every stage of this journey, but we labor to accomplish this ideal.

Saul Birnbaum is really and truly helping us in these endeavors. It is not easy to speak of Saul Birnbaum's work for us in conventional terms. Let me first give you my impression of Saul. His humility is profound and sincere. His bearing is modest. But we immediately become aware that we have in our midst a remarkable person. With his insight and concern he quietly forces us to think differently of our efforts. His gentle and self-effacing manner and his earnestness, convince me that his efforts on behalf of the school mirror the attributes of good citizenship in their noblest quality. He is a dutiful son to his mother, now old and helpless. You may well ask, is this really a true judgment? *I am convinced by instinct and by personal association that Saul Birnbaum is now motivated by the essence of the charity that you described in your April decision. It moved him deeply and made him truly a part of us.*

When he first came here he asked me many questions. He told me that what he had seen and heard at the Hillel School moved him to lend his full support and effort. This he has done, and done so completely and sincerely that he has now become a vital part of our future.

For Saul Birnbaum our small school looms very large indeed. He concerned himself immediately with the safety and comfort of our student body. He spent days in the study of our physical structure. Saul insisted that important construction work be instituted on new classrooms and improvements to the library. We have now undertaken this work.

Hebrew day schools are tragically underfinanced. I should not confine it to our Hillel school. I guess it is generally true. Business has certainly never been my strong point. I was therefore happy when Saul Birnbaum looked into our financial picture. Saul met with me and our Board, which he joined as a member. He accepted the chairmanship of our development pro-

gram, starting with his own generosity. It was not a chairmanship in name only. It was work and plans and aggravation and understanding for untold hours. We are finally moving in the right direction, to solvency.

He was concerned with our dinner and our other fund raising efforts and led the way with his advice and participation on a regular basis.

Saul Birnbaum is not only concerned with our present program, he is also the big hope for the future for myself and our students.

I cannot conceal my deep emotion and disappointment on the reflection that this man whose mind has lit up our future and who has spent so much time in loving concern for our Hillel school might be taken away from us. He came to us with a contrite spirit and a willing heart and hand. I have great fear that all the good you have done to motivate him in behalf of charity work may be destroyed by the sentence. He has tried and accomplished much in a truly sincere effort. Let him stay with us, I beg of you.

Judge Cooper, I feel a special intimacy with you on this because we have already received so much help by what you did. I also feel that nothing but harm can be achieved by execution of the sentence.

We would be filled with deep gratitude if you, with your great understanding, would reconsider the sentence of Saul Birnbaum and let him continue to be with us. Let his wonderful talents continue to work for us and help us build a future for our youth. I shall deem it a privilege to sit with you and discuss this matter further.

With your help we hope to continue to be a bright beacon to our youth and successfully travel the road to more enlightening contributions to society.

Sincerely yours,

MORRIS SCHMIDMAN
Rabbi and Dean"
(Emphasis supplied)

APPENDIX D

[Letter, dated December 22, 1967, from Family Court Judge (now Supreme Court Justice-elect) Maurice Bernhardt, President of the Pride of Judea Children's Services, to Judge Irving Ben Cooper]

"Dear Judge,

I am the President of the Pride of Judea Children's Services, an agency that has served the children of our city for over 50 years.

I write to tell you of my warm feelings toward Saul I. Birnbaum, a most valued and respected member of our Board. *He is a kind, compassionate and generous human being. I say this to you, with full awareness of the circumstances which have brought Mr. Birnbaum to his present plight.*

He has met with me in my chambers and has come to many conferences at the Pride. I am profoundly impressed with his deep dedication and devotion to our work. He has developed an understanding of the urgency of mental health problems and is filled with compassion for the families and children whom we serve.

With Mr. Birnbaum, it has been my experience that no task is ever too small or too great for him to tackle and he has devoted a major portion of his time to us on a continuous basis. Our organization's outstanding men and women, have great regard for Mr. Birnbaum and find him almost indespensible as a leader and supporter of our very important service.

It would indeed be a tragedy for our children if Mr. Birnbaum's efforts were interrupted. His confinement would remove one of our most ardent supporters and deal a terrible blow to our programs. I do not refer to Mr. Birnbaum's financial generosity alone. I refer

to his active participation, guidance and wisdom in helping us plan for the future.

One case in point, is Saul's creation of our special "School Phobia Program". Many months ago Saul visited the Pride Building, he met with the staff, and observed the scores of deeply disturbed and troubled children struggling to find their way back through the deep shadows of mental illness.

Saul was visibly impressed by one very real and growing problem. There are thousands of children who, for one reason or another develop a phobia to school. Their fear is so intense that they refuse to attend school; many seek to hurt themselves and inflict serious physical damage to their bodies to avoid school attendance.

Long periods of time elapse and their troubles worsen. The child is suspended from the Public School system and before long become trapped by a very serious emotional problem compounded by a total lack of education.

Saul was deeply touched. He asked what could he do for these school phobic children. He wanted to help. And help he did. He established a new program for these children at the Pride of Judea. This unique program in conjunction with the Pride of Judea Clinic and School encourages the disturbed child to resume his studies under carefully supervised, warm and understanding surroundings. Specially trained teachers offer him a helping hand, enabling the child to find his way out of the darkness. We dedicated these special classes to Saul and named the program after him.

Because of Saul's help the children receive individual therapy and small personalized classroom experience. After a long period of this intensive therapy some of the children are already able to attend Public School, accompanied by their "Pride" teacher for about 1 hour a week.

It would be a great loss to the Pride of Judea as well as to these children and their parents if this wonderful program were curtailed.

Throughout the long history of our agency, men like Saul Birnbaum have given of their time and energy to build this wonderful institution. Saul is certainly carrying on in this great tradition.

Pride was organized as an orphan home, but since 1959 we provide the full spectrum of psychiatric services for children and their families.

Our annual budget is $640,000 and we provide these services: 1) Child Guidance Clinic, which is concerned with the diagnosis treatment and prevention of emotional problems in children and their families.

Our case load is enormous and our waiting period is about 1½ to 2 years. To cope with this situation the Pride expanded its range and extent of services and instituted a rapid intake system; family treatment; group psychotherapy; joint counselling; play therapy; individual psychotherapy; individual counselling; group counselling; family interviewing. Mr. Birnbaum's efforts in these areas enabled us to expand these programs rapidly.

We have professional affiliations with Columbia University and New York University Schools of Social Work and with Yeshiva University Schools of Special Education. All three assign students for study training at the Pride.

This important recognition of our high standards permits us to actively participate in the training of graduate students and to help create a reservoir of professional talent for future staff.

2) The Pride School and Treatment Center for Seriously Emotionally Disturbed Children is a day school which is treatment and research oriented.

The children in our school come from all neighborhoods. They are representatives of 500,000 such chil-

dren in the United States. For every child in the school there are thousands waiting in their homes.

Judge Cooper you can help us. We need Saul Birnbaum and his ever present aid and advice. We need his dedication and ability. The children also look to you for your help. Saul Birnbaum's confinement would profoundly affect all those who desperately need his help. I feel so strongly about this man, that I implore you to reconsider. I would gladly put aside all of my commitments and meet with you any time at your convenience for further discussion of this problem.

Sincerely,

HON. MAURICE BERNHARDT
President"
(Emphasis supplied).

APPENDIX E

[Letter, dated December 23, 1967, from Arthur Gottlieb, Vice President of the Menorah Home and Hospital for the Aged and Infirm, to Judge Irving Ben Cooper]

"Dear Judge Cooper:

I am writing this letter as a vice president and director of the Menorah Home and Hospital For The Aged and Infirm.

In April 1966, Supreme Court Justice Louis Heller introduced me to Saul Birnbaum with the hope that some very significant philanthropic effort could be developed in behalf of Menorah.

The Home is one of the country's truly outstanding centers for the aged—providing pioneering efforts through its day center, its psychiatric clinic for the aged, its hospital and its residence. A total of 1,000 aged persons receive help at Menorah. The Home was founded in 1909 and has been a leader in developing new concepts in care for the aged.

Menorah has been hailed by Presidents, Governors and Mayors and works closely in training and research programs with various universities. The home is held in high regard in professional and philanthropic circles.

As you well know, raising sufficient funds for the home is one of the major problems confronting this institution as every other such facility. Each year a great effort must be undertaken to meet the increasing costs of labor, supplies, renovations and new facilities.

This year, Menorah planned and executed its most successful dinner and journal in its long history. One of the main reasons was the superb efforts of Saul Birnbaum.

Initially, Saul visited the home and studied its operations. He spoke to our residents and to our staff. He

familiarized himself with our problems and programs and plunged into a continuing effort to help our aged.

Saul accepted our invitation to become chairman of our journal committee. This entails a very large responsibility. And he shouldered that responsibility. Saul attended a series of approximately 25 meetings and cocktail parties and organized a successful fund drive for Menorah through our 1967 Journal.

He helped plan the journal format and ad blanks. He prepared lists of new names of possible contributors. These names ran into thousands. They covered virtually every field of endeavor from labor union leaders to manufacturers, from stock brokers to attorneys.

He then helped create a large committee of people who participated in the fund drive. He worked closely with them as chairman.

Saul personally contacted hundreds of individuals. He met with many of them and wrote to them. He called and cajoled and succeeded in raising a very large sum of money for the home. He used his personal contacts to enlarge the home's group of supporters.

His advice was invaluable and our future drives will undoubtedly benefit greatly from the new directions and enthusiasm which he gave to us as well as from the great number of new supporters whom he brought to us.

Two valuable concepts were encouraged and developed by him during his association with Menorah. One, that a large number of small donors is essential to the success of any institution; by encouraging the less affluent to participate in its development they become an integral factor and provide a strong and enduring base for the organization. Make the "small giver" feel important! Two, interest young people in the activities of the Menorah Home and Hospital.

As soon as the 1967 annual dinner and journal campaign was over, Saul had already embarked on the 1968 journal drive.

In addition, Saul's knowledge and technical ability in the nursing home field, as well as the areas of finance and administration undoubtedly could prove to be of extreme value to the home on a long term basis.

He has volunteered to assist me in my role as a vice president in the home in regard to long range fiscal planning for our institution, and I consider this of great value.

It has been a pleasure working with Saul Birnbaum. Whenever we had a problem, Saul was there. He wasn't a "sometimes show" personality. He was constant in his devotion and energy and is a fine example for other charity minded persons.

In view of his invaluable work through our Journal, Annual Dinner and counsel to me, were he to be removed from his active participation, there would be a genuine loss to this agency.

I would be pleased to meet you to discuss this matter.

Sincerely yours,

ARTHUR GOTTLIEB
Chairman of Dinner and
Year Book"

APPENDIX F

[Letter, dated November 13, 1967 from Appellate Division Justice George J. Beldock, President of Brotherhood-In-Action, to Judge Cooper]

"Dear Judge Cooper:

I take the liberty of addressing you on behalf of the above named defendant.

May I state at the outset that in my twenty years on the Bench I have never written to a sentencing Judge, and, on but one occasion have I telephoned in connection with a matter of sentencing.

I do so in this case as I believe it to be justified by the unusual circumstances of your statement made at the time of sentencing, as well as his subsequent conduct and activities, of which I am personally aware.

Judge Heller has been my close and intimate friend since our boyhood days. We were brought up in the same neighborhood, and throughout the years, up to the present time, have enjoyed a warm association as social friends, lawyers and as judges. We have served together in many fraternal, civic and charitable causes. Judge Heller is a very valuable and active member of the Board of Brotherhood-In-Action which, as you may know, I founded twenty-five years ago to deal with racial, religious and intergroup tensions.

When Judge Heller originally discussed with me the desire of this defendant to become an active participant in the human relations work of Brotherhood-in-Action, *he made full disclosure of the defendant's background.* It was not until I had met and talked with Mr. Birnbaum at great length that I made the judgment that he was an unusual and talented person who merited the chance to prove to us his sincerity of purpose and dedication to causes above and beyond his own personal interests.

I thereupon decided to afford him the opportunity, through Brotherhood-in-Action, *to demonstrate whether he could fit into the structure and pattern of your outline of 'rehabilitation' so poignantly expressed at the time of sentence.*

May I say that I consider your approach in this case to be a pioneering, novel and humane one—truly in the best tradition of our new concept of sentencing psychology.

Although I had never been confronted with this type of situation *I must say this also presented somewhat of a challenge for me, for our cause, and for society in general.*

I think it proper to report to you upon the results which I am pleased to say completely justified my initial judgment of the man. He has served Brotherhood-in-Action well, was available often and displayed genuine and sincere interest in our work and the development of more useful programs to further our cause. This—beyond and above the assignments allotted to him.

His deep interest in our programs and his willingness to serve and to contribute of his time, effort and resources have been most gratifying. Having observed his selfless zeal in our work and the sincere manner of his conduct and his endeavor to serve his fellow man, I venture to predict that if permitted he will continue throughout his lifetime to take this type of genuine interest in causes such as ours, and others, which seek to alleviate the suffering, the impoverished, the underprivileged and the disadvantaged in our communities and in the nation.

With warm personal regards, I am

Respectfully yours,

GEORGE J. BELDOCK"
(Emphasis Supplied)

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329-700—69——1

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 792

SAUL I. BIRNBAUM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. A1–A11) is reported at 402 F. 2d 24.

JURISDICTION

The judgment of the court of appeals was entered on October 2, 1968. Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to December 3, 1968, and on December 3, 1968, the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court erred in refusing to place petitioner on probation after his appeal had been con-

cluded because the judge at the time he originally sentenced petitioner to a year in prison, said he "might" impose probation if he became convinced "upon an impressively convincing showing" that petitioner had "realigned his sights," and petitioner took substantial steps in an effort to meet the condition.

STATEMENT

After a jury trial in the Southern District of New York, petitioner, a certified public accountant, was convicted on two counts of an indictment which charged a conspiracy with Harold Simon, an Internal Revenue Service Agent, to have Simon corruptly audit certain tax returns of Alexander L. Guterma, Robert C. Leonhardt and McGrath Securities Corporation, and that petitioner brought about the payment of a bribe to Simon (18 U.S.C. 371; 18 U.S.C. 201, 202). The facts underlying the conviction developed at the second trial of the offense,[1] are set forth in considerable detail in the opinion affirming the conviction. 373 F. 2d 250, certiorari denied, 389 U.S. 837. They showed, *inter alia,* that petitioner told his confederates in the sale of unregistered stock that he "had had lots of dealings with Internal Revenue agents and he knew which ones of them could be taken care of."

At the time of sentencing on April 1, 1966, petitioner's counsel argued that petitioner was "a man not in need of rehabilitation because it is hard to conceive of a person more productive and living

[1] A prior conviction was reversed. 337 F. 2d 490.

a more honest and responsible life than Mr. Birnbaum does as he is here today" (S. Tr. 2176).[2]

Prior to imposing sentence, Judge Cooper, apparently responding to counsel's argument, noted that petitioner had advanced from an economically deprived boyhood to an overwhelmingly secure economic status, but that petitioner had given nothing back to the community, and that petitioner's sense of value was warped, although he believed petitioner did have the instinct to respond to the outcry of the unfortunate. He then said:

> However, now is not the time to explore that phase, for you have not accepted the jury's verdict and faced up to its import. You protest your innocence and you are on the way to appeal. Certainly that is your legal right.
>
> For the present, then, in the light of your fame [sic] of mind, let me just add that if your conviction is sustained, this Court *might,* and *I emphasize might,* upon an impressively convincing showing that you have realized, or rather realigned, your sights and devoutly wish to give a hunk of yourself as well as your wealth in doing with constancy those acts which will really help your fellow Americans and at the same time enhance you [sic] personal well-being immeasurably, I say this Court *might* consider * * * a program of rehabilitation without confinement as provided for by 18 United States Code, Section 3651. [Emphasis supplied.] (S. Tr. 2182–2184).

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[2] "S. Tr." refers to the Sentencing Transcript, a copy of which we are filing with the Clerk of the Court. Other references used herein are the same as those used by petitioner. See Pet. p. 2 n. 2.

The Court then sentenced petitioner to a year in prison (this was six months less than the 18 month sentence imposed at the first trial).

After the denial of the petition for a writ of certiorari from the affirmance of the conviction, petitioner, through new counsel, filed a motion for reduction and suspension of sentence. He alleged that, aided by Justice Heller of the New York Supreme Court,[3] petitioner had begun a program of work in varied charities and that, while the Justice had "provided the necessary initial introductions," petitioner had since been able to find his own way. He said that since sentencing, he had contributed $82,000 and made commitments for $35,000 more. Also set forth were the activities in which petitioner had engaged, a review of his background and a recital of the difficulties and stress he had been under since the first trial. In response, the government noted that petitioner's bribery of Agent Simon had been shown to have been undertaken to conceal a fraudulent sale of stock from which petitioner had netted $190,000; that petitioner's bribe of Simon did not appear to be an isolated transaction, and that petitioner still did not concede guilt (CN Ex. 2, pp. 4–5). In argument on the motion, former Federal Judge Simon Rifkind, petitioner's new counsel, noted that a judge could act under Rule 35 on his own motion and said he was stressing that fact because "I assign no error to the original judgment, to the first sentence." He noted Judge Cooper's known interest in probation as an instrument of moral re-

[3] Judge Cooper had referred to Justice Heller's interest in petitioner at the time of the original sentence (see ft. 4 at Pet. 5).

education and set forth the factors that he thought warranted probation (CN Ex. 4, pp. 10–22, 29–30, 33, 34). Government counsel pointed out in reply, *inter alia*, that when the talk was about rehabilitation, "it seems to me that one of the things you are talking about is having the person stop saying everyone is taking advantage of him when the record, nor [sic] rumor, not hearsay, not insinuation establishes the facts that he better face." (CN Ex. 4, pp. 37–38). Counsel pointed out that the defrauding of the public and the bribe were committed by a wealthy man without personal responsibilities who showed he believed that money buys anything and that contribution of money to charity did not show a change in that philosophy. (CN Ex. 4, pp. 40–41). At the conclusion of the hearing, the judge said that he would have the probation report brought up to date (CN Ex. 4, p. 44).[4] On December 6, Judge Cooper ruled that after "long and careful consideration to all of the facts and circumstances of this case, including the defendant's background, the nature and gravity of the offense of which he stands convicted, the probation report from which I have obtained the greatest possible assistance," he was satisfied that the sentence should not be disturbed (Pet. App. A–12).

In a petition for reargument, petitioner set forth in greater detail his efforts on behalf of various charities and offered testimonials by various people in his be-

[4] While the court of appeals opinion states that this was the first report prepared by the probation department, Pet. App. A–5, n. 4, the transcript of the sentencing indicates that the judge did have a presentence report at that time (S. Tr. 2161, 2167).

half. Judge Cooper nevertheless adhered to his former decision, stating that he had been moved by the faith demonstrated by those who signed statements on petitioner's behalf and the high-minded citizens who called on the judge; that he had given the case "reflection seemingly without end," had estimated "the extent of defendant's activities since imposition of sentence" and had weighed "the justice due community and defendant alike." (Pet. App. A–12).

Petitioner then moved before Judge Wyatt for a writ of error coram nobis seeking the grant of probation and asking that Judge Cooper be disqualified on the ground that he was a material witness. In an affidavit annexed to the motion, petitioner stated that after the original sentencing proceeding on April 1, 1966, his attorneys told him they took Judge Cooper's statement to mean that if during the then forthcoming appeal "I were to involve myself substantially in philanthropic activities and if thereafter the conviction were affirmed, Judge Cooper would in all probability suspend the sentence and grant me probation."

He then recited that he showed the sentencing minutes to Justice Heller and told him he was troubled about his sentence and how to comply. Justice Heller met Judge Cooper at a fraternal organization dinner and told him of petitioner's puzzlement. Judge Cooper reportedly remarked to Justice Heller " * * * if he doesn't know, why don't you guide him? * * * why don't you act as his unofficial probation officer and show him the ropes?" It is said that "Justice Heller agreed to so so" and that Judge Cooper indicated approval of three suggested charities with which peti-

tioner might become involved. Justice Heller then visited the three organizations and arranged for petitioner's introductions. Sometime thereafter, Justice Heller told petitioner he had met Judge Cooper at a theatre and "as the unofficial probation officer" reported that petitioner was actively and financially identified with the organizations that Justice Heller had recommended and others that petitioner had sought out. Judge Cooper reportedly replied: "That's good, that's fine." C.N.A. Ex. 2.[5]

Counsel's affidavit annexed to the motion alleged that "* * * in the factual circumstances presented, Judge Cooper was under a constitutional duty to grant Birnbaum probation after Birnbaum for eighteen months engaged in the charitable activities * * * with the knowledge and approval of Judge Cooper;" that the denial of probation was "arbitrary and without a constitutionally adequate statement of findings or reasons" (p. 5). In a memorandum in support of the application, counsel argued that, in effect, petitioner had been compelled to pay a large fine and had already been placed on probation. Judge Wyatt denied the motion without a hearing (Pet. App. 13).

Appeals from the denial of the Rule 35 motion by Judge Cooper and the coram nobis motion by Judge Wyatt were consolidated. The court of appeals affirmed both judgments.

[5] No affidavit from Justice Heller was submitted to support these statements in petitioner's affidavit.

329-700—68——2

ARGUMENT

1. Petitioner's basic contention is that he is now entitled to be placed on probation because at the time Judge Cooper imposed the one year sentence of imprisonment he stated that if petitioner's conviction was sustained on appeal, "This Court might, and I emphasize might, upon an impressively convincing showing that you * * * realigned your sights * * * this Court might consider * * * a program of rehabilitation without confinement * * *." We submit, however, that the sentence of one year's imprisonment originally imposed was eminently fair and that nothing in Judge Cooper's statement or subsequent acts entitle petitioner to be relieved of the prison sentence which his crime clearly merited.

The record supports the conclusion that Judge Cooper did—as he said he did—weigh "the justice due community and defendant alike" and reasonably determined that the original sentence should not be disturbed. The sentence of one year's imprisonment which petitioner originally received is a particularly mild one in view of the facts of this case. The crime of bribing a government official is one which strikes at the heart of our governmental process and is aggravated by the fact that it was here engaged in by one who has derived great benefits from our society. Nor is it irrelevant that testimony at the trial portrayed petitioner as boasting that "he had lots of dealings with internal revenue agents and he knew which ones of them could be taken care of and this was one." See 373 F. 2d 250, 254. In addition, as the court of appeals noted on the appeal from petitioner's conviction, the

evidence supported the conclusion that the purpose of the bribe was not merely to evade taxes for a client, but also "to avoid an SEC investigation" of the stock transaction giving rise to the tax liability—a transaction from which petitioner had derived profits of $190,000. See 373 F. 2d at 255–56. In these circumstances, it is fair to say that Judge Cooper was most lenient in imposing a one year sentence on petitioner—a sentence which was six months less than that imposed by Judge Murphy after petitioner's first trial and six months less than the eighteen months sentence which the revenue Agent involved had already served.[6]

Judge Cooper's remarks at the time of sentencing must be considered against this background and in the light of the fact that counsel was arguing that petitioner had already been rehabilitated. Judge Cooper was trying to explain what he deemed true rehabilitation to be, a giving of oneself to others. We think it is unfortunate that Judge Cooper phrased his remarks in such a way that petitioner could interpret them as suggesting that he might escape the imprisonment which his conduct merited by contributions to charity of money or time. In our view, the wiser course would have been to refrain from raising such hopes. But it is at least clear from Judge Cooper's remarks as to "an impressively convincing showing" that petitioner had "realigned" his sights, that the judge meant something more than the act of giving money or time; that he was talking about a change

[6] It is thus clear that petitioner is incorrect in asserting that at the time of sentencing Judge Cooper did not consider relevant factors in mitigation (See Pet. 24–26).

of outlook or philosophy. Moreover, the judge did make it entirely clear that he was not making any promises. He stressed the word "might." If he promised anything, he promised only to consider the possibility of probation if petitioner made an impressively convincing showing that he had realigned his sights.

Nor did the judge's actions after the sentence was imposed improperly mislead the defendant into thinking that he was being promised probation. While petitioner relies heavily on his allegations concerning Judge Cooper's conversations with Justice Heller (Pet. 38–40), it is important to note that, even accepting petitioner's allegations,[7] Judge Cooper did not seek out Justice Heller to ask him to direct petitioner's action; rather, on two occasions petitioner's friend Justice Heller approached Judge Cooper at social functions to discuss petitioner's activity. Moreover, petitioner's assertions that Justice Heller became petitioner's unofficial probation officer may overstate the justice's involvement somewhat. In the letter which Justice Heller sent to Judge Cooper in connection with petitioner's motion to reduce sentence, Justice Heller referred to Judge Cooper's statement at sentencing and then stated:

> Mindful of the perceptive and wise remarks you then uttered, I undertook, as a friend to help guide the defendant toward a path of service and dedication to the community and his fellow man. I introduced him to leaders of three (3) outstanding communal and charitable en-

[7] As noted above no affidavit from Justice Heller was ever submitted.

> deavors, but not without first explaining to these men the nature of his conviction, and of your statement. * * *
> * * * I might add that this was the only extent of my participation in this rather unusual experience at helping to rehabilitate a man whose life in the past (as you so properly assessed it) had been involved solely with making money." [Amicus Br. pp. 18–19].

Thus, the record establishes that Judge Cooper in no way indicated that he was promising petitioner probation. Indeed, even after Judge Cooper had denied petitioner's motion to reduce sentence, petitioner's counsel recognized that there had been no promise of probation. In seeking to stay petitioner's sentence, counsel argued that petitioner needed time to arrange his affairs and stated, "Perhaps Birnbaum was overly optimistic about the possibility that Judge Cooper would grant his application." (Affidavit of Joseph J. Ackell in Support of the Motion for an Extension of Time in Which to Surrender, dated December 8, 1962). Moreover, in none of the arguments before Judge Cooper was it ever suggested to him that he promised petitioner that he would be placed on probation.[8]

[8] This case is thus distinguishable from *Saldana* v. *United States*, 365 U.S. 646, where the judge who accepted the defendant's guilty plea unequivocally promised him a sentence of five year's imprisonment, saying "I will keep my word and I will make it five years to run concurrently" (Brief for the United States, *Saldana* v. *United States*, No. 176, October Term, 1960, p. 8). The reason that the 5-year sentence was not im-

Whether the showing petitioner made at the time of the motion to reduce was the impressively convincing showing to which Judge Cooper had referred was a matter for Judge Cooper to decide. As noted above, the one-year sentence was a lenient one. While it is true that petitioner had engaged in charitable activities during the time his conviction was being appealed, it did not necessarily follow that he had "realigned his sights." Petitioner's commitment of something more than $100,000[9] to charity is not wholly impressive when it is remembered that he made a profit of $190,000 on the stock deal which led to the bribe in question. Moreover, as the government noted in its argument before Judge Cooper (CN Ex. 2, pp. 405), petitioner did not commend himself for probation by refusing to acknowledge culpability even after full appellate review and a finding by all the appellate judges that the evidence of guilt was overwhelming.

In sum, we believe that in view of all the circumstances presented, the sentence of one year's imprisonment was appropriate, and that the trial court did not act improperly in refusing to reduce that sentence.

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posed immediately was that the government wished to delay the sentence until after Saldana had testified at the forthcoming trial of his co-defendant. Thereafter, however, the co-defendant became a fugitive and the sentencing came before a different judge, who vacated the guilty plea and, after a jury trial, sentenced Saldana to 20 year's imprisonment. This Court, in effect, enforced the promise made by the first judge.

[9] In this regard it is significant to note that the additional presentence report prepared in connection with the motion to reduce contained an assessment of petitioner's wealth (CNM p. 41).

2. There is no basis for petitioner's assertion that Judge Cooper's refusal to reduce sentence "was in retribution for the arguments made by counsel on appeal. * * *" (Pet. 31). From the beginning, Judge Cooper anticipated that the propriety of his charge would be one of the issues raised on appeal (S. Tr. 2157). Nor was Judge Cooper's decision not to reduce sentence made precipitously. After extensive papers were filed by both petitioner and the government, the judge heard oral orgument on November 15, 1967. The transcript of that argument reflects that petitioner's counsel was treated with the greatest courtesy and that the judge was deeply concerned with reaching a proper decision in the case (CN Ex. No. 4, pp. 2–3; 43–44). Moreover, the judge delayed his decision on the motion until he could receive a further report concerning petitioner from the probation department. It was only after this report was received that on December 6, 1967, Judge Cooper denied the motion to reduce the sentence. Thereafter a motion for reconsideration was submitted. In ultimately denying relief on January 4, 1968, Judge Cooper stated:

> Upon reflection seemingly without end and after estimating the extent of defendant's activities since imposition of sentence and weighing the justice due community and defendant alike, on the merits I am constrained to and do grant the motion for reargument and upon such reargument adhere to the denial entered upon the original application on December 6, 1967.

In view of the careful consideration which Judge Cooper gave to petitioner's motion over an extended

period of time—during which petitioner remained free on bail—it is unreasonable to suggest that the judge denied petitioner's motion because he was angered by the appellate argument.[10] To be sure, it is regrettable that Judge Cooper's extemporaneous comments at sentencing about the possibility of probation should have furnished the predicate for such a claim. But the fact is that Judge Cooper's decision to adhere to the original sentence—lenient as it was—was fully justified by legitimate considerations and there is no indication that his ruling was otherwise premised. To indulge suspicions in these circumstances would seem to press too far a proper concern for "appearances." In our view, even the most "fastidious regard for the honor of the administration of justice" (*Communist Party* v. *Subversive Activities Control Board*, 351 U.S. 115, 124) does not require impugning the integrity of a judge on such a basis.

3. Nor is there merit to petitioner's argument that Judge Cooper's suggestion that he might subsequently reduce sentence rendered the entire proceeding invalid. The sentence of imprisonment originally imposed was no more tentative than any other federal sentence which remains subject to reduction under Rule 35 after the appellate process has been completed. If the existence of power to change a sentence is deemed to be an unconstitutional impediment to an

[10] It is worth noting that no such contention was advanced when petitioner's counsel moved for a writ of error *coram nobis* before Judge Wyatt. In that motion counsel argued only that Judge Cooper had been swayed by the government's argument as to the serious nature of the crime and that Birnbaum was unworthy of probation.

attack on rulings by a district judge on appeal, then the entire procedure for reduction of sentence spelled out in Rule 35 is subject to the same deficiency. Yet that procedure was found sufficiently desirable so that, in the amendment to the Rules of Criminal Proc dure the period in which the court may act was doubled from 60 to 120 days.

As we have observed above, it is unfortunate that Judge Cooper was as explicit as he was as to what factors he would consider in exercising his power to reduce sentence. It cannot be said, however, that this made the sentence tentative. Petitioner's counsel before the district court did not so consider it. He stated that he was not attacking the original sentence but was merely asking the judge to exercise his power under Rule 35 to consider conditions as of the date of the motion.

CONCLUSION

Petitioner says, in effect, that he was misled by Judge Cooper, and argues that the hope raised by Judge Cooper should be enforced by a sort of estoppel in order to avoid the appearance of an injustice. But the appearances work both ways. It is not good for the administration of justice that it should appear that a wealthy man can avoid a jail sentence by gifts of his money and time to charity. It is not good for the administration of justice that the instigator of a bribe should be placed on probation while the government official who received the bribe has served a term in prison.

The situation is an unfortunate one, which should provide lessons for the future. But, in the light of all the facts, the decision reached below should stand. The petition for a writ of certiorari should be denied.

Respectfuliy submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 792

SAUL I. BIRNBAUM,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

I.

Introduction.

The Solicitor General of the United States concedes that this case is "an unfortunate one, which should provide lessons for the future" (Brief in Opposition,[1] p. 16). He characterizes as "regrettable" Judge Cooper's comments at sentencing about the possibility of probation.[2] He regards it as "unfortunate" that petitioner was misled by

[1] Hereinafter cited as "Opp. p. ——".

[2] The Solicitor General states "[I]t is regrettable that Judge Cooper's extemporaneous comments at sentencing about the possibility of probation should have furnished the predicate for such a claim." (Opp. p. 14)

these comments into believing that he could avoid imprisonment by contributing his time and money to charitable organizations.[3] And he concedes that it would have been "wiser" for the Judge not to have raised petitioner's "hopes" of probation in the way that he did (*Id.* p. 9).[4] Yet despite these critical concessions and confessions, the Government asks this Court to deny the petition and affirm the challenged sentence for reasons which are neither responsive to the arguments raised in the petition nor relevant to the issues properly before this Court.

The Government seems to be arguing that even though Judge Cooper engaged in unfortunate, regrettable and unwise actions, the resulting sentence of one year should stand for three reasons: (1) because it is a "mild" or "lenient" sentence for the crime of which petitioner stands convicted (Opp. pp. 8, 9, 12); (2) because "the government official who received the bribe has served a term in prison" (*Id.* p. 15); and (3) because "a wealthy man" should not be able to "avoid a jail sentence by gifts of his money and time to charity" (*Ibid.*).

Whether or not a one-year sentence for the crime of bribery is or is not lenient[5] is, of course, not at issue here.

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[3] The Government's brief concedes "[I]t is unfortunate that Judge Cooper was as explicit as he was as to what factors he would consider in exercising his right to reduce sentence." (Opp. p. 15)

[4] The Solicitor General confesses "We think it is unfortunate that Judge Cooper phrased his remarks in such a way that petitioner could interpret them as suggesting that he might escape the imprisonment which his conduct merited by contributions to charity of money or time. In our view, the wiser course would have been to refrain from raising such hopes." (Opp. p. 15)

[5] There is in fact nothing in the record to justify the assertion that the sentence was mild or lenient in the light of all the circum-

Petitioner is not seeking the kind of appellate review of the length of his sentence afforded by the courts of Great Britain. He is seeking relief from a sentence imposed in an improper and unlawful manner.[6] Nor is the sentence received by the agent who allegedly accepted the bribe appropriately relevant to this Court's decision. The government official involved pleaded guilty before trial, whereas petitioner exercised his right to stand trial. *United States* v. *Birnbaum*, 337 F. 2nd 490, 491 (2nd Cir. 1964). Obviously, it could not be argued that if prejudicial

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stances. Judge Cooper did not so characterize it; nor did the Court of Appeals. Indeed, the former's remarks at the time sentence was imposed clearly indicated that he believed there existed "reasons, in mitigation of sentence." (Pet. p. 6, n. 4) Moreover, the imposition of a lesser sentence after the reversal on appeal is not evidence of leniency, but a common practice in recognition of the additional suffering or adversity undergone by the defendant.

[6] In attempting to establish that a one-year sentence was "lenient," the government conjures up a series of unproved charges and irresponsible innuendo. It alleges, for example, that petitioner's sale of the Shawano stock, which supposedly netted him $190,000 was "fraudulent" (Opp. p. 4). The government ought to know better, since on another occasion the prosecutor said: "I am not suggesting that Birnbaum did anything wrong in selling his Shawano shares to the public, I want to be clear on that. I am not suggesting that." (C.N. Ex. 5, pp. 2-5) Yet this is precisely what the government—without any basis in the record—is asking this Court to accept as a fact. In a similar vein, the government asserts that "petitioner's bribe of Simon did not appear to be an isolated transaction. . . ." (Opp. p. 4) Yet thorough investigation by the government failed to disclose any other instance of alleged wrongdoing by petitioner. Indeed, since the government refers to Simon, it is appropriate to add that Simon, the alleged receipient of the bribe, testified over and over again at voir dire that petitioner was not involved in the bribery (Appendix in the Court of Appeals in No. 30511 at p. A-261), but the Government avoided presenting that testimony to the jury. Instead, the Government relied for testimony on the issue on the assertions of confessed perjurors (id. at A-120, 216, 292) who though named as co-conspirators were never prosecuted.

error occurred during petitioner's trial there should be no reversal on the ground that "the government official who received the bribe has served a term in prison". Nor can it properly be argued that error occurring in the course of sentencing should go uncorrected for the same reason.

The third reason offered by the government for affirming petitioner's sentence is even more troublesome. The Solicitor General obviously disagrees with the original condition established by Judge Cooper. He thinks the Judge was wrong in offering petitioner an opportunity to avoid imprisonment by making substantial charitable contributions of time and money. For this reason, he is opposed to enforcing the arrangement made by Judge Cooper even though he concedes that "petitioner took substantial steps in an effort to meet the condition" (Opp. p. 2). This argument is, however, wholly improper in the present context of this case. It was Judge Cooper, and not the petitioner, who created the "appearance" objected to by the government. It was the Judge who volunteered that he "might" impose probation rather than imprisonment if petitioner gives "a hunk of yourself as well as your wealth" to charity. Now that petitioner has devoted much of his time, energy and resources to such activities in reliance upon the judicial admonition, it is entirely improper for the government to raise questions—for the first time—about the propriety of the offer made by Judge Cooper. Even if the original offer was improper, still it was made by a member of the judiciary and acted upon by a defendant. It must, therefore, be enforced by this Court, perhaps with a caveat that such offers ought not be made in the future. Indeed, if the "appearance" objected to by the government is to be prevented in the future it cannot be prevented by denying the writ

and by permitting the decision below to stand. Rather, such action can only have the opposite result, for the court of appeals rested that decision in part upon the likelihood "that in the judge's eyes appellant did not make the 'impressively convincing showing' that the judge felt was necessary before he could grant probation" (App. A, p. A-11; 402 F. 2d 24, 30), thereby clearing implying that a jail sentence might have been avoided by even greater gifts of "time and money to charity".

II.

The Relevance of *Saldana* v. *United States*.

The brief in opposition attempts to distinguish this case from *Saldana* v. *United States*, 365 U. S. 646 (1961), where this Court, at the suggestion of the Solicitor General enforced a judicial "promise" similar to the one at issue here.[7] But a careful reading of the record makes it clear that the only relevant distinctions between the cases make this one an even stronger candidate for judicial supervision and reversal.

In *Saldana* the defendant had pleaded guilty to two counts of a five count narcotics indictment, whereupon the presiding judge asked: "Would you like to have me make it five years on each Count and to run concurrently and waive time right now." (Transcript of Record in *Saldana* v.

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[7] *Saldana* was a *per curiam* decision which was decided on the basis of the Court's independent examination of the record and "in the light of the Solicitor General's suggestion" made during oral argument. 346 U. S. 647. At the request of the Solicitor General, joined by counsel for petitioner, tapes of the oral argument were made available to counsel, but only after the petition was filed. The oral argument has been transcribed, and ten copies of the transcript (which is referred to hereinafter as "Tr. p. — ") have been lodged with the Clerk of the Court.

United States, No. 176 Oct. Term 1960, pp. 15-16) Defense counsel replied in the affirmative, but the government attorney objected to the imposition of sentence at that time on the ground that a co-defendant was scheduled to stand trial within a few days and that no final sentence should be imposed on Saldana until after the co-defendant's trial. The judge responded "I see. They are afraid that he might get on the stand at the other trial and take all the blame." (Id. p. 16) He thereupon granted the government's request to postpone sentencing, but reasurred the defendant that he "will keep [his] word and . . . will make it five years . . . " (Id. p. 17) (The obvious meaning of this, intended by the judge and understood by the defendant, was that he would make it five years if, and only if, Saldana conducted himself "properly" at his co-defenant's trial, see pp. 8-9, *infra.*)

As it turned out, the co-defendant became a fugitive and was not tried. Another district judge was then scheduled to impose sentence on Saldana but he refused to accept the guilty plea because "it smacks too much of having the appearance of a bargain."[8] (Transcript of Record in *Saldana* p. 24) The defendant then went to trial on all five counts, was convicted on four, and sentenced—by the second judge—to twenty years.

After affirmance by the Court of Appeals, this Court granted a writ of certiorari, despite the Solicitor General's opposition to such grant. In his brief on the merits, the

[8] The second trial judge also indicated that he did not consider himself "bound by any statement made by" the first judge, and the defense attorney conceded this, stating that: "I realize you cannot be and should not be bound by a statement of one of your fellow judges. And I would hesitate to even suggest to you that at the time of the sentence that you should be bound by that." (Transcript of Record in *Saldana,* p. 28)

Solicitor General vigorously defended the power of the second trial judge to require Saldana to stand trial on all five counts and also defended the power of the second judge to impose a sentence in excess of that which the first judge indicated he would impose. But despite his conclusion that "the legal rulings in this case were correct", the Solicitor General expressed his view that the case "presents a delicate problem in the administration of criminal justice aside from the legal correctness of the rulings involved." (Brief for United States in *Saldana,* pp. 28-29) The Solicitor General conceded that "[p]etitioner could hardly have avoided a deep sense of grievance" at what appeared to him to be a reneging on what he considered a promise. "The situation," in the Solicitor General's opinion, was "not a happy one." Accordingly, he invited the Court to consider

> "whether, irrespective of the legal issue of power, the natural grievance resulting from the difference between a promise of a five-year sentence and the resulting twenty-year sentence so departs from the appearance of even-handed justice before a district court of the United States that some relief ought to be granted under the supervisory power of this Court." Id. p. 31.

The Supreme Court accepted this invitation and reversed and remanded the case "[i]n the light of the Solicitor General's suggestion, and upon an independent examination of the record . . . ". It agreed with the Solicitor General that "the combination of circumstances . . . beginning with one judge's clearly expressed intention to impose a five-year sentence, and ending with another judge's imposition of a twenty-year sentence . . . was not consistent with that

regularity and fairness which should characterize the administration of justice in the federal courts." 365 U. S. at 647.

The brief in opposition seeks to distinguish *Saldana* from this case on the ground that in *Saldana* the trial judge "unequivocally promised [defendant] a sentence of five years imprisonment . . ." (Opp. pp. 11-12, n. 8). That is simply not the case. There was no unequivocal promise in *Saldana;* the record makes it clear that the judicial representation there, like here, was a conditional one. What the first judge meant in *Saldana* is that he would impose a five year sentence if *Saldana conducted himself properly at his co-defendant's trial.* He obviously reserved the right to reassess the situation and increase the sentence if Saldana attempted to take the entire blame at the subsequent trial. That was the reason why the government opposed the imposition of sentence before the trial and that was obviously the reason why the judge ruled in favor of the government's objection. Moreover, there was never any promise—conditional or otherwise—to dismiss the remaining three counts of the indictment. At most, "the record strongly suggests that the petitioner left the hearing . . . with the belief . . . that the three remaining counts would be dismissed." (Brief for United States in *Saldana,* p. 29) Similarly here, as found by the Court of Appeals, petitioner Birnbaum "interpreted the court's remarks to mean that if the conviction was sustained Birnbaum could, by following the guidelines in the court's remarks, avoid imprisonment and receive probation." (App. A, p. A-4). Moreover, this interpretation was considerably and reasonably strengthened as a result of the subsequent conversations involving Judge Cooper, Justice Heller and petitioner. The judicial state-

ments relied on in this case are, therefore, indistinguishable from those made in *Saldana.* And if, as the Solicitor General says, this Court "in effect, enforced the promise made by" the judge in *Saldana,* (Opp. p. 12, n. 8) then this Court should also enforce the similar promise here made.

There is another critical respect in which this case is similar to *Saldana.* In this case, the Solicitor General urges affirmance of the sentence because he disagrees with the merits of the original representation made by Judge Cooper: he does not believe that a person should be offered an opportunity to receive probation as a result of charitable contributions of time and money. It is important to note that the Solicitor General in *Saldana* had similar misgivings, yet he suggested reversal:

> ". . . even though I feel that this representation ought not to have been made, I say that with some dissidence (sic) about the District Judge, but I do not think that that was consistent with good practice, the representation that he would some day impose a life [sic, light] sentence. *Still it was made.* And there is, as with all of us, if the Court, the law does not keep its promises, this too tends to show some doubt about the integrity of the whole proceeding." (Transcript p. 16).

Similarly, whatever legitimate doubts one may have about the admonition expressed by Judge Cooper, "[s]till it was made" and petitioner complied with it.

Moreover, there are in this case a number of additional factors, not present in *Saldana,* which make this case a stronger one for reversal. In *Saldana,* the Solicitor General was asked whether "defendant and counsel in reliance [upon "the expectation of a five year sentence"] took any action which otherwise they would not have taken?" He

replied: "I don't think it could be said that there was any action they took in reliance on the promise" (Tr. at p. 30). In this case, petitioner, his counsel, and the charities took a number of important actions specifically in reliance on the expectation that petitioner would not go to jail if he contributed his time and money to charity. Petitioner contributed significant amounts of time and money in reliance on Judge Cooper's admonition. The charities permitted him to become involved in their work and, in at least one case, with their children. For more than 18 months, petitioner was subjected to a regimen dictated—albeit in general terms—by Judge Cooper, involving controls over petitioner's behavior far exceeding that which is imposed by conditions of bail, yet without the protections afforded by other forms of supervised release.[9] Other possible reliances are more speculative but equally important. For example, after a conviction in a difficult case, a deal is sometimes made between the defendant and the government, whereby the government agrees to recommend a probationary sentence if the defendant foregoes his appeal. Judge Cooper's statement in this case made it seem unnecessary for petitioner to explore this avenue, since Judge Cooper indicated

[9] In its opposition brief, the government unfairly suggests that contributions of money constituted petitioner's principal involvement with charity. (Opp. pp. 5, 16) As indicated in the petition —and in greater detail in the *amicus* brief of the charities—money was only a small part of petitioner's involvement. He spent the good part of each week for upwards of 18 months—more days than he would spend in prison if his sentence is affirmed—in rendering invaluable services to the charities. The government also suggests that "petitioner's assertions that Justice Heller became petitioner's unofficial probation officer may overstate the Justice's involvement somewhat." (Opp. p. 10) Petitioner submits that if anything, it understates it; there is hardly a jurisdiction in which official probation officers spend more time with their charges than Justice Heller spent with petitioner here.

that petitioner could have his appeal *and* his probation if he followed the admonition. In any event, it is clear that the reliances in this case were significantly greater than in *Saldana.*

There is another respect in which this case is stronger for reversal than *Saldana* was. In *Saldana,* the Solicitor General emphasized that the problem there was not caused by the government.

> "I do feel that this is a matter which the Government did not bring about, that the Government's position was not responsible for its arising and that it does concern the judicial administration rather than the conduct of a trial." (Tr. p. 27)
>
> • • • • •
>
> "They were not mistakes, if they were mistakes, which resulted from the government's position, or, indeed, neither were they urged upon the court by it." (Tr. p. 38)

In this case, as detailed in the petition at pp. 15-16, n. 18, the government was substantially responsible for what occurred here, because it repeatedly argued—as it was not entitled to do—that petitioner should go to jail because he protested his innocence.[10] Similarly, if, as the Solicitor

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[10] There is one important lesson which the Government still has not learned from this case. It continues to argue before this Court —as it argued in every court below—that "petitioner did not commend himself for probation by refusing to acknowledge culpability even after full appellate review. . . ." This line of argument is, as pointed out in the petition, in direct conflict with the holdings of two circuits. In *Thomas* v. *United States,* 369 F. 2nd 941 (5th Cir. 1966), the Fifth Circuit explicitly held that a defendant could not be punished—or denied a benefit—for refusing to acknowledge his guilt. And in *United States* v. *Wiley,* 267 F. 2d 453 (7th Cir.

General now urges, Judge Cooper erred by prescribing an "unfortunate" and "regrettable" course, then the Government shares responsibility therefore because it stood mute when it should have spoken.

Finally, this Court took the action it did in *Saldana* despite the fact that it had been advised that a change in the calendar system in the district court where the case was tried "insures that what occurred in this case will not occur again". 365 U. S. at 647. Although the Solicitor General expresses the view that this case "should provide lessons for the future" (Opp. p. 16), no assurance against repetition has in fact been provided.

III.

The Retributive Nature of the Sentence.

The government maintains that there "is no basis for petitioner's assertion that Judge Cooper's refusal to reduce sentence 'was in retribution for the arguments made by counsel on appeal. * * *'" (Opp. p. 13) This argument comes with particularly poor grace from the government which itself urged Judge Cooper to consider the arguments made on appeal as a reason for refusing to reduce sentence (Pet. pp. 15-16). What the government seems to be

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1959), the Seventh Circuit held that a defendant could not be refused probation because of his assertion of innocence. Yet despite these holdings—and despite the spirit of the Constitution which surely condemns punishing a man for asserting his innocence—the government continues to ask this Court to exact a judicial punishment from petitioner because he refuses to "acknowledge culpability". The government has obtained all it has a right to from petitioner under our system of justice: his total compliance with both the orders and suggestions of the courts; it cannot—and should not—be entitled to make him engage in the spectacle of public confession.

saying is: "we tried to persuade Judge Cooper to consider the arguments, but there is no evidence that we succeeded." Judge Cooper did, however, refuse to reduce the sentence after listening to the government's arguments and it seems more logical—and fairer—to assume that he was so influenced. Moreover, as was pointed out in the petition (Pet. pp. 31-32, n. 36), if the *coram nobis* petition had not been erroneously denied it would have been possible to establish as a fact that Judge Cooper's decision not to grant probation was motivated by the appellate argument critical of him.[11]

IV.

The Tentative Nature of the Sentence.

Petitioner devoted the major portion of his opening petition to the fundamental question: "Does a federal trial judge (not acting pursuant to 18 U.S.C. §4208(b)) have authority to impose on a convicted defendant a tentative sentence "for the present", reserving both imposition of final sentence and consideration of factors relevant to the sentence until after the defendant has exhausted his right to appellate review?" (Pet. pp. 3, 17-30) Petitioner demon-

[11] On two occasions in their brief in opposition, the Government indicates that no affidavit from Justice Heller was submitted to support petitioner's characterization of his role as "unofficial probation officer". (Opp. pp. 7, 10) As stated in the petition: "The affidavit states that one of petitioner's attorneys showed the relevant portion of the affidavit to Justice Heller who verified the accuracy of the description of the conversations." (Pet. at p. 9) In any event, the Court of Appeals accepted as a fact petitioner's version of these events. Finally, the events would have been established in open court had not petitioner's request for a hearing been erroneously denied. It is unfair, therefore, for the government to speak as if there were some doubt about the accuracy of these events; on the record of this case, this Court must accept them as true.

strated that the use of a "for the present" sentence of the kind imposed here endangers the freedom of the appellate process and specifically conflicts with the principles and holdings of this Court's recent decisions in *Corey* v. *United States,* 375 U.S. 169 (1963), and *United States* v. *Behrens,* 375 U.S. 162 (1963), as well as with the decisions of various United States Courts of Appeal (Pet. pp. 22-28). The opposition brief makes no attempt to dispute this line of argument. Instead, it is content to rely on the assertion that:

> "The sentence of imprisonment originally imposed was no more tentative than any other federal sentence which remains subject to reduction under rule 35 after the appellate process has been completed." (Opp. p. 14)

But there are a multitude of differences—critical differences of law and policy—between the routine operation of Rule 35 and the kind of "for the present" sentence at issue here. As this Court has said: "Rule 35 refers to the power of a court to reduce a sentence which has already become final in every respect," *United States* v. *Behrens, supra,* at 165. In imposing the original sentence, the judge must *intend* for it to be final. To be sure, he will understand that the sentence may subsequently be reduced if it is found to have been based on "misapprehension" as to the relevant sentencing criteria. But he will expect the sentence to remain unchanged unless "facts [are] presented . . . which were not before the Court at the time sentence was imposed." *United States* v. *Stromberg,* 179 F. Supp. 278, 280 (S.D. N.Y.), *aff'd,* 268 F.2d 256 (2nd Cir.), *cert. denied,* 361 U.S. 863 (1959). Thus, the true office of Rule 35 is to afford the trial judge an opportunity to correct a sentence which he intended would be final when he imposed it, but which now

appears excessive in light of factors not available to him at that time. This bears little similarity to Judge Cooper's action in this case. Here Judge Cooper never intended the one year "for the present" sentence to be final (or if he did, then he misled petitioner brutally). He never focused his mind on what an appropriate final sentence would be because he decided that this "was not the time to explore" concededly relevant aspects of petitioner's character. As the Court of Appeals found: "Judge Cooper unambiguously reserved the power to reassess the situation [after the appeal]." App. A, p. A-9. And he engaged in the improper practice of "dangling the possibility" of probation before the petitioner. The dangers inherent in this practice have been recognized by this Court in the *Corey* case *supra,* and are spelled out in detail in the petition. There are no similar dangers in the *proper* use of Rule 35 to reduce a sentence intended to be final when imposed. The dangers flow from the *improper* use of Rule 35 to circumvent the safeguards of §4208(b) by imposing a sentence *intended by the judge and understood by defendant* to be tentative and subject to reconsideration after the appeal. This is precisely what occurred here, and this is precisely the kind of distortion of Rule 35 that, unless stopped now, may turn a benevolent ameliorant into a vehicle of judicial abuse.

CONCLUSION

The Solicitor General concedes that the case is "unfortunate" and "regrettable" and that it "should provide lessons for the future" (Opp. p. 16). But he offers no suggestion as to how the "lessons" of this case can be communicated to bench and bar. Surely a few isolated sentences sprinkled through a brief in opposition to certiorari will

not bring home these lessons. In our system of government, lessons are provided for the lower courts by the appellate courts. Only if the petition in this case is granted will its important lessons be learned.

Even more fundamental to our system of justice is the principle that any deprivation of rights "calls for prompt rectification", not for future lessons. *Watson* v. *Memphis*, 373 U.S. 526, 532-33 (1963). "The rights here asserted are, like all such rights, *present* rights; they are not merely hopes to some *future* enjoyment . . . " *Id.* at 533 (emphasis original). The guarantees of our system "are warrants for the here and now [which must] be promptly fulfilled" *ibid.*, rather than "lessons for the future". If petitioner's rights were violated, as the Solicitor General seems to concede they were, then his sentence cannot be permitted to stand. The appropriate relief which he seeks should be granted.

Respectfully submitted,

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January 7, 1969

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 792

SAUL I. BIRNBAUM,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION

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IN THE

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REPLY BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION

The Government concedes, not once but on four separate occasions in its brief (pp. 9, 14, 15, 16), that the totality of circumstances of this case are not consistent with that regularity and fairness which should characterize the administration of criminal justice in the federal courts, viz., *"The situation is an unfortunate one, which should provide lessons for the future"* (p. 16). That concession accords with statements made by the District Court (Judge Wyatt) and the Second Circuit that, though they would not afford relief, they might not have acted as the trial court (Judge Cooper) here did (*Amicus* Brief pp. 22-23). In short, everyone has now conceded that an in-

justice has been worked, but no one seems willing to rectify it.

Indeed, the Government has gone beyond conceding that "[t]he situation is an unfortunate one" and that it is "regrettable" that Judge Cooper acted as he did. The Government asserts that this "unfortunate" case "should provide lessons for the future". We agree. However, such lessons cannot be learned simply because the Government concedes their validity and importance in a brief *opposing* the grant of certiorari. Only the archives and the authors of the brief will benefit from such important "lessons". Their validity must be expressed by this Court upon the grant of certiorari and the rectification of this concededly "regrettable" and "unfortunate situation". Indeed, any other action would permit the decisions below to stand as precedential support for the proposition that the trial court acted properly and for the lesson that others can hereafter act similarly.

To avoid confession of error, which its repeated concession clearly warrants (*Saldana* v. *United States*, 365 U.S. 646 (1961)), the Government concludes that this "unfortunate situation" should not be rectified and the lessons of that situation not taught because Birnbaum is a wealthy man. Such argument is an exercise in sophistry.*

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* The Government also concludes that this "unfortunate situation" should not be rectified because Birnbaum stands convicted of a crime with all of its attendant circumstances. Manifestly this "regrettable" and "unfortunate situation" could not have occurred absent such conviction. Equally obvious is the fact that the trial court necessarily had clearly in mind the nature and scope of that crime when at sentencing it initiated the rehabilitation-probation program and certainly when, following sentencing, the trial court twice acquiesced in the continued conduct of such program by Birnbaum and the charities. Indeed, as stated by the trial court at sentencing: "After all, there are varying degrees of iniquity. I do not regard you as beyond recall" (Petition, p. 5, n. 4).

Birnbaum may be a wealthy man; however, neither the charities nor Birnbaum asked Judge Cooper to be "as explicit as he was as to what factors he would consider in exercising his power to reduce sentence" (Gov't Brief p. 15). Judge Cooper unilaterally and explicitly prescribed the course and the charities and Birnbaum faithfully followed that course.* If the Government believed, as it now urges, that that course was an "unfortunate" or "regrettable" one, it should have so stated at sentencing (and it did not), rather than to permit the charities and Birnbaum to embark upon and pursue that course in the expectation that the promised probation would be forthcoming.

For two or three days a week *since May, 1966* (or for a period substantially in excess of the proposed term of imprisonment) Birnbaum has given generously of his time and wealth, and by so doing he has faithfully followed the explicit directions of the trial court. We appear as *amicus curiae* because by his deeds Birnbaum has to this very day continued to demonstrate that he is prepared to perform, as he has performed, those acts which have made him a useful and constructive member of society.

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* Significantly, the Government studiously avoids answering the points made in our main brief that the sentence was invalid unless the course prescribed is viewed as an incident of promised probation and that the failure of the trial court to make findings to support its refusal to honor its promise was a denial of due process. Indeed, having conceded that this situation is "unfortunate" and "regrettable", the Government then studiously avoids coming to grips with the numerous legal defects inherent in that situation. That strategem though, perhaps, tactically sound, does not obviate the fact such legal problems here exist, that important questions are raised meriting the grant of certiorari and that an injustice conceededly has been done which ought to be rectified (and in the process a concededly important lesson taught with respect to the administration of criminal justice in the federal courts).

No one—not Judge Cooper, not the Government, not the Courts below—has at any time found that Birnbaum has not in fact been rehabilitated in precisely the manner prescribed by Judge Cooper.

We agree that *"The situation is an unfortunate one, which should provide lessons for the future."* Hence, certiorari should be granted to rectify that situation and to teach those lessons.

January 7, 1969.

Respectfully submitted,

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No. 792

IN THE

Supreme Court of the United States

October Term, 1968

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SAUL I. BIRNBAUM,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING

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IN THE

Supreme Court of the United States

October Term, 1968

No. 792

SAUL I. BIRNBAUM,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING

The petition for a writ of certiorari in this case was denied on March 24, 1969. The Chief Justice, along with Mr. Justice Douglas, filed a seven page dissent.[1] Mr.

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[1] The Chief Justice summarized his reasons for dissenting as follows (slip op. at 3):

> Certiorari should be granted, I believe, for two reasons that are inescapably clear from this record: (1) the district judge's imposition of a "tentative" sentence clearly violated the principle, inherent in 18 U.S.C. §4208(b) and our decisions dealing with that statute, that a defendant must be given the option of waiting until the tentative sentence becomes final

(Cont'd.)

Justice Marshall "took no part in the consideration or decision of this petition."[2]

The petition, as well as the government's brief in opposition, rested on an assumption of law which petitioner has just learned may very well be erroneous. And it is reasonable to conclude that this Court's decision may also have been premised on the same erroneous assumption.

It will be recalled that the issue raised in the petition for certiorari grew out of remarks made by Judge Cooper to petitioner at the sentencing proceeding held April 1, 1966. Judge Cooper said that he "might" impose probation after the appeal upon a motion under Rule 35 if petitioner gave of his time and money in charitable activities. Both petitioner and the government assumed that Judge Cooper had the *legal power* to do what he said he might do – to impose probation upon a motion under Rule 35. Petitioner has just learned, however, that there is now some question whether Judge Cooper would have been legally empowered to do that. On January 13, 1969, this Court denied certiorari in the case of *Whitfield v. United States,* 401 F.2d 480 (9th Cir.

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[1] (Cont'd.)

before appealing his conviction; (2) the district judge's refusal to suspend sentence, after petitioner fully complied with the conditions laid down for such suspension, is inconsistent "with that regularity and fairness which should characterize the administration of justice in the federal courts." *Saldana v. United States,* 365 U. S. 646, 647 (1961).

[2] Presumably, Mr. Justice Marshall recused himself because of possible prejudice, or appearance of prejudice, resulting from the fact of his having occupied the office of Solicitor General during earlier stages of this case. Petitioner would like to make it clear that he welcomes participation by Mr. Justice Marshall in the consideration and decision of this petition for rehearing.

1968) (Oct. 1968 term, no. 709). In that case, the United States Court of Appeals had decided that "a Rule 35 motion pertains only to the correction or reduction of a sentence; *neither the suspension of sentence nor the granting of probation constitutes the correction or reduction of a sentence.*" 401 F.2d at 482 (emphasis added).[3]

If it is true that Judge Cooper did not have the legal power to impose probation as he said he "might", then the posture of this case changes dramatically. The unfairness, and invalidity, of the original sentencing proceeding is multiplied many times. As the Chief Justice observed in his dissent to the denial of certiorari in this case: "Given his situation, petitioner had no choice but to treat the trial court's remarks as a promise and then proceed, as he did, to comply with its conditions" (slip op. at 6). In complying with these conditions, petitioner underwent substantial "added restraints imposed on his time during the 18 months while the appeal was pending" (slip op. at 5). It is one thing to undergo such restraints where there is a genuine possibility that probation may result; it is quite another thing to be induced to do so where the judge, unbeknownst to petitioner, may not even have been empowered to grant the promised probation.[4] The Court of Appeals in this case characterized Judge

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[3] It is petitioner's position that this conclusion is wrong; petitioner strongly maintains that a Federal judge may, under Rule 35, lawfully reduce a sentence of imprisonment to probation, especially when he has previously said he "might" do so. Petitioner is simply pointing out the contrary view of a United States Court of Appeals which may be—although he thinks it is not— a correct statement of the law.

[4] The Chief Justice recognized that Judge Cooper's statement must be deemed a promise. He said: "I think the circumstances of this case demand at least that *the trial court's promise* be kept and that the prison sentence be reduced to one year's probation" (slip op. at 6; emphasis added).

Cooper's sentencing admonition as "a calculated risk" that Birnbaum undertook in order to avoid "confinement". But if it is true that Judge Cooper was not authorized by law to exercise his discretion so as to free petitioner from confinement, then what petitioner undertook was not "a calculated risk" at all; it was a judicially imposed exercise in futility. Even if Judge Cooper had concluded – as the Chief Justice stated the evidence required him to – that petitioner had fully complied with his conditions, he might still not have been able to "deliver" what he promised. And even if Judge Cooper had imposed probation, the government could have appealed and had his decision reversed as it did in a similar case, *United States v. Ellenbogen*, 390 F.2d 537 (2d Cir. 1968) (also brought to petitioner's attention only recently). In the *Ellenbogen* case, Judge Cooper reduced a sentence of one year and a day to probation, and the Court of Appeals reversed, raising questions about Judge Cooper's power to impose probation under Rule 35.[5]

Petitioner submits that this line of cases, raising doubt about Judge Cooper's legal authority to impose probation in the exercise of his discretion under Rule 35, undercuts the assumption on which the government's presentation to this Court was predicated. It places the case in an entirely new light. Two Justices of this Court were convinced that Judge Cooper "exceeded his authority" (slip op. at 5) and engaged in "a serious departure from accepted judicial behavior" (slip op. at 6). How much clearer is the departure in light of the new development outlined above.

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[5] "We stress the time of sentencing as the appropriate occasion for probation to be considered by the trial judge." 390 F.2d at 543; see also *id.* at 540. In another recent case, *United States v. Coke*, 404 F.2d 836 (2d Cir. 1968), the Second Circuit, *en banc*, reversed Judge Cooper's action in increasing a defendant's sentence after a successful appeal.

Petitioner believes that the Solicitor General ought to have an opportunity to present his views to the Court on this important new issue. In his brief in opposition to the petition for certiorari, the Solicitor General characterized this case as "troublesome", and Judge Cooper's sentencing admonition as "regrettable". How much more troublesome and regrettable this case may now appear to the Solicitor General in light of these doubts whether Judge Cooper could have done what he said he "might" do. Accordingly, petitioner requests this Court to invite the Government to file a reply to this petition for rehearing.

In addition to the new question raised by this recent line of cases, the dissenting opinion of the Chief Justice suggests two important arguments not pressed, but implicit, in the original petition for certiorari. The Chief Justice pointed out that "if the district judge was imposing a one-year prison term, he had no authority to exact, in addition, a lengthy period of probation," namely, "the added restraints imposed on his time during the 18 months while the appeal was pending" (slip op. at 5). The imposition of this double penalty – eighteen months of control over petitioner's life, plus one year in prison – constitutes an impermissible form of double punishment. Indeed, the penalty was in reality a triple one: the year in prison; the eighteen months of control; and the extraction of a "fine" of "over $100,000 in personal funds" (slip op. at 3) (a fine many times in excess of that authorized by the statute).

The Chief Justice also observed that Judge Cooper "happened to change his mind *for reasons known only to him* . . . " (slip op. at 5; emphasis added). But the reasons why Judge Cooper "changed his mind" remain secret because Judge Cooper did not choose to reveal them, and because petitioner was erroneously denied a hearing at which he would have had an opportunity to establish that these "reasons" were wholly improper ones.

Petitioner respectfully requests this court to remand this case to an appropriate district court for a hearing. At such a hearing petitioner would have an opportunity to establish that the Judge was "in fact, vindictive."[6]

Petitioner argued, in his reply brief (at pp. 15-16), that the concededly important "lessons" of this case could not be effectively communicated unless the sentencing decision of the District Court were reversed. This is still true, even in light of the lengthy dissenting opinion of the Chief Justice. This case will still be understood as a six-to-two endorsement of Judge Cooper's "serious departure from accepted judicial behavior" (slip op. at 6). The only way for the Court to assure that this kind of "departure" will not recur is to grant the instant petition. Nor are there any countervailing reasons why the relief requested by petitioner should not be granted. Indeed, considerations of equity and public interest in petitioner's remaining out of jail are greater now than ever. Within the past few weeks, the St. Augustine Episcopal School, of which Petitioner is a leading supporter, was totally destroyed by fire. Although the Mayor of New York City provided temporary quarters for the students, plans must now be made for a new permanent home. Petitioner's involvement in this project is crucial, as it is in the other charitable endeavors in which petitioner continues to be instrumental.

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[6] In the oral argument in *Pearce v. North Carolina* (No. 413, argued February 24, 1969), the following relevant dialogue occurred:

> Q. What would you say if there were proof that the second sentencing judge had been, in fact, vindictive?
>
> A. [By attorney for North Carolina] That would be a flagrant violation of the man's constituional right to appeal.
>
> Q. Of what constitutional right?
>
> A. The constitutional right to appeal without any fear of reprisal . . . ".

In filing this rehearing request, petitioner would like to bring another important new matter to the attention of this Court. Petitioner has recently informed his attorneys that he has reason to suspect that various of his telephone conversations during the course of this case may have been unlawfully overheard by agents of the Government. The record establishes at least one instance of arguably unlawful recording of a telephone conversation between petitioner and Mr. Leonhardt.[7] Accordingly, counsel for petitioner has written to the Attorney General of the United States requesting that he inform petitioner of any other instances of overhearing and/or recording of any of petitioner's conversations.[8] Petitioner will, of course, immediately inform the court of any response received from the Attorney General.

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[7] *United States v. Birnbaum*, 373 F.2d 250 (2d Cir. 1966), Appellant's Appendix (Stipulation).

[8] A copy of the letter is attached as Exhibit A.

CONCLUSION AND RELIEF SOUGHT

For the foregoing reasons, petitioner respectfully requests the Court to invite the Solicitor General to respond to this petition for rehearing and then to grant the petition. Petitioner additionally requests this Court to stay issuance of the mandate pending consideration of this petition for rehearing.

Respectfully submitted,

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April 1, 1969

EXHIBIT A

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April 1, 1969

The Honorable John N. Mitchell
Attorney General of the United States
United States Department of Justice
Washington, D. C. 20530

Dear Mr. Attorney General:

I represent Saul I. Birnbaum, who was convicted of a Federal crime (61 Cr. 991, S.D.N.Y.). An aspect of his case is presently pending before the United States Supreme Court on a petition for rehearing of the Court's denial of a petition for certiorari. *Birnbaum v. United States,* No. 792 (decided March 24, 1969).

Mr. Birnbaum recently informed me that he had reason to suspect that various of his telephone conversations during the course of the investigatory and other stages of his case may have been overheard. The government has disclosed and petitioner knows that at least one telephone conversation between him and a Mr. Leonhardt was overheard and recorded (presumably with the latter's consent).[1] He does not know, however, whether other conversations were overheard and/or recorded either with or without the consent of the other party.

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[1] *United States v. Birnbaum,* 373 F.2d 250 (2d Cir. 1966), Appellant's Appendix (Stipulation).

The Hon. John Mitchell
Page 2

In accordance with your policy of disclosing, upon request, any and all instances of wiretapping (or other electronic eavesdropping), I would appreciate your advising me whether Mr. Birnbaum's voice was ever overheard and/or recorded by any agents of the government, either with or without the consent of the other party.[2]

A copy of this letter has been filed with the Supreme Court today in connection with the petition for rehearing referred to above, and I would appreciate your answer as soon as possible.

Sincerely yours,

/s/ Harold F. Reis

Harold F. Reis

HFR/smt

cc: The Honorable Erwin N. Griswold

---

[2] Although the United States Supreme Court has never explicitly held that it is illegal for the government to overhear or record a conversation where one party has consented, a recent *en banc* decision of the United States Court of Appeals for the Seventh Circuit has held that, absent a valid warrant, the government may not overhear or record a conversation between two parties where one, but not the other, has consented. *United States v. White*, Nos. 16,021, -22 (decided Jan. 7, 1969). Accordingly, information is requested as to whether the government overheard and/or recorded any such conversation, as well as any conversation where there was no consent by either party.

CERTIFICATE OF COUNSEL

I, Harold F. Reis, hereby certify that the accompanying petition for rehearing is presented in good faith and is not being filed for purposes of delay, and that the petition is restricted to circumstances of substantial or controlling effect which have intervened since the filing of the petition for writ of certiorari in this case.

/s/ Harold F. Reis

Harold F. Reis